

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-4057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067,
77-4068, 77-4073,
77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

AND UNITED STATES OF AMERICA,

Respondents,

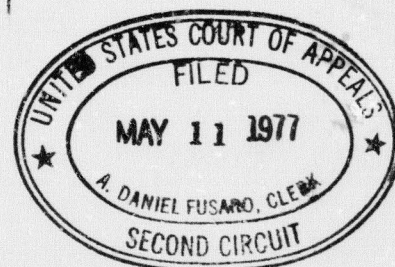
MCI TELECOMMUNICATIONS CORP., ET AL.,

Intervenors.

On Petition for Review of Orders of the
Federal Communications Commission

JOINT APPENDIX TO THE BRIEFS

VOLUME I



PAGINATION AS IN ORIGINAL COPY

JOINT APPENDIX TO THE BRIEFS

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RELEVANT DOCKET ENTRIES

- In this proc. & Doc. 19746
- 4 - NOTICE OF INQUIRY AND PRM adopted directing that there is instituted an inquiry and prn into the matters set forth therein. Members of the public are put on notice that any policies which may be established may be embodied in rules of the Comm.; That Docket 19746 IS TERMINATED and the issues set for investigation therein are to be considered in this inquiry; That Western Union's Petn. for Inquiry and Rulemaking (RM-2218) IS GRANTED, to the extent described therein; That all interested persons may participate in accordance with procedures set forth therein within the following time period. Comments are to be filed on or before 9-9-74; reply comments are to be filed on or before 10-24-74; responses to reply comments are to be filed on or before 11-25-74. All relevant and timely comments and reply comments will be considered by the Comm. before final action is taken. Should participants believe that fur. procs., including oral hrgs. are needed to develop a sufficient record for the resolution of particular issues, they should make appropriate reqs. as part of their final filing allowed by this paragraph. Such reqs. should be specific as to the issues to be considered, the nature of the procs. required and the reason such procs. are necessary. That the Comm. will issue a First Report and Order and will designate therein issues to be investigated in oral hrgs., if and to the extent such procedures appear necessary or appropriate. This is a restricted proc. and any action taken by the Comm. will be based on matters submitted for the record or incorporated into the record; An orig. and 14 copies of all comments, replies, pleadings, briefs and other documents shall be furnished the Comm. sna
- 7-9-74 - Joint Petn. for Leave to Intervene filed for MCI Telecommunications Corporation, MCI-New York West, Inc., Interdata Communications, Inc. and Microwave Communications, Inc. sna
- 7-15-74 - Joint Petn. for Leave to Intervene filed for Southern Pacific Communications Company and Transportation Microwave Corporation. sna
- 7-15-74 - Petn. for Leave to Intervene filed for Air Transport Association of America. sna
- 7-15-74 - Petn. for Leave to Intervene filed by Philip M. Walker, Vice President & General Counsel, and Donald E. Ward, Atty., Telenet Communications Corporation. sna
- 7-19-74 - Motn. for Extn. of Time for filing comments, reply comments and responses filed for AT&T. sna
- 7-22-74 - Petn. for Leave to Intervene filed for National Retail Merchants Association. sna

- 74 - Petn. for Leave to Intervene filed for Data Transmission Company. sna
- 4-24-74 - Comments on AT&T's 7-19-74 motn. for extn. of time filed for The Western Union Telegraph Company. sna
- 7-25-74 - Joint Petn. for Enlargement of Issues filed for MCI Telecommunications Corp., et al. sna
- 7-29-74 - Petn. for Leave to Intervene filed for GTE Service Corporation on behalf of its affiliated GTE telephone operating companies specified therein. sna
- 7-29-74 - Statement in Support of AT&T's 7-19-74 Motn. for Extn. of Time filed for Aeronautical Radio, Inc. sna
- 7-31-74 - Ltr. stating that it be included in any listing of participating parties filed for ITT World Communications Inc. sna
- 8-1-74 - Petn. for Leave to Intervene filed for the Central Committee on Telecommunications of the American Petroleum Institute. sna
- 8-2-74 - ORDER adopted by the Chief, CC Bur. directing that the time to file comments is extended until 11-11-74; the time for file reply comments is extended until 12-23-74; the time to file responses to reply comments is extended until 1-22-75. Released 8-7-74. sna 8-9-74 - CORRECTED ORDER released changing reply comments date to 12-23-74. sna
- 8-7-74 - Petn. for Leave to Intervene filed for Utilities Telecommunications Council. sna
- 8-7-74 - Opposn. to MCI's 7-25-74 Joint Petn. for Enlargement of Issues filed by Philip M. Walker, Vice Pres. & Gen. Cnsl., and Donald E. Ward, Attys., for Telenet Communications Corp. sna
- 8-7-74 - Petition to Intervene filed for North American Telephone Association. mbd
- 8-7-74 - Opposition to MCI 7-25-74 Petition for Enlargement of Issues filed for American Telephone & Telegraph Company. mbd
- 8-9-74 - Petition for Leave to Intervene filed for Association of American Railroads. mbd
- 8-19-74 - Joint Reply to AT&T and Telenet, Opposition to MCI's 7-25-74 Pet. for Enlargement of Issues/MCI Telecommunication Corp. et al. mbd
- 9-25-74 - M.O. & O. adopted directing that MCI's 7-25-74 Pet. for Enlargement of Issues is DENIED; all interested persons who will be filing comments and reply comments and reply comments in this Proc. shall so inform the Comm. two weeks prior to the last date for filing comments, the Comm. will prepare and promulgate, by Public Notice, a list of such persons, this list will be the service list in this Docket and all comments and reply Comments are to be served on the persons appearing on such list. (Comms. Wiley, Chairman and Reid Concurring in the result.) Released: 10-3-74 mbd
- 10-3-74 - Notice of Intention to File Comments filed for American Trucking Associations, Inc. mbd
- 10-3-74 - Ltr. Notifying Comm. of its intention to file comments & Reply comments filed for Packet Communications, Inc. (Copy sent to K. Griffith, C/C Bur.
- 10-3-74 - Ltr. requesting to file Comments and Reply Comments therein. mbd

9-25-74 M.O. & O. DENIED

- 10-7-74 - Notice of Intention to file Comments for Utilities Telecommunications Council. mbd
- 10-7-74 - Notice of Intention to Participate filed for Southern Pacific Communications Company and Transportation Microwave Corporation. mbd
- 10-7-74 - Notice of Intention to Participate filed for Air Transport Association of America. mbd
- 10-7-74 - Joint Notice of Intention to Participate filed for MCI Telecommunications Corporation et al. mbd
- 10-8-74 - Ltr. advising of its intention to file comments & reply comments filed for Western Union Telegraph Company. (Copy sent to K. Griffith C/C Bur.) mbd
- 10-9-74 - Notice of Intention to Participate filed for Aeronautical Radio, Inc. mbd
- 10-9-74 - Ltr. advising of its intention to file comments & reply Comments filed by Donald J. Elardo, Senior Regulatory Atty. for Data Transmission Co. (Copy sent to K. Griffith, C/C Bur.) mbd
- 10-9-74 - Notice advising of its intention to file comments & Reply comments filed for ITT World Communications, Inc. mbd
- 10-10-74 - Ltr. advising that it intends to file comments & Reply comments filed for Wells National Service Corp. (Copy sent to K. Griffith, C/C Bur.) mbd
- 10-10-74 - Ltr. advising that it intends to file comments & reply comments filed for American Facsimile Systems Inc. (Copy sent to K. Griffith C/C Bur.) mbd
- 10-10-74 - Notice of Intention to Participate filed for Securities Industry Automation Corporation. mbd
- 10-17-74 - Notice of Intention to file Comments filed for Central Committee On Telecommunications of The American Petroleum Institute. mbd
- 10-23-74 - Notice of Intent to Participate filed for Commodity News Services, Inc. mbd
- 10-23-74 - Notice of Intent to Participate filed for The Associated Press. mbd
- 10-23-74 - Notice of Intent to Participate filed for American Newspaper Publishers Association. mbd
- 10-24-74 - Notice of Intent to Participate filed for Dow Jones & Company, Inc. (Copy sent to D. Morper, C/C Bur.) mbd
- 10-24-74 - Notice of Intent to Participate filed for American Satellite Corporation by David A. Irwin, Counsel, Regulatory Matters. mbd
- 10-25-74 - Notice of Intent to Participate filed for National Association of Motor Bus Owners. mbd
- 10-29-74 - Telegram intending to file Comments & Reply Comments filed by Warren F. Prince, Vice President for Tymshare Inc. (Copy sent to D. Morper C/C Bur.) mbd
- 10-29-74 - Notice of Intention to file Comments and/or Reply Comments filed for GTE Service Corporation. mbd
- 10-29-74 - Notice of Intention to Participate filed by Edward P. Taptich for Graphnet Systems, Inc. mbd
- 10-29-74 - Notice of Intention to Participate filed by Edward P. Taptich for General Electric Company. mbd

- 10-29-74 - Notice of Intention to Participate filed by Edward P. Taptich for Computer and Business Equipment Manufacturers Association. mbd
- 10-29-74 - Notice of Intention to file Comments filed for RCA Global Communications, Inc. (Copy sent to D. Morper, C/C Bur.) mbd
- 10-29-74 - Notice of Intention to Participate filed for National Data Corporation. mbd
- 10-29-74 - Notice of Intention to file comments filed for Remote Data Processing Services Section of Adapso, Inc. mbd
- 10-29-74 - Notice of Intent to Participate filed for Aerospace Industries Assn. of America, Inc. (Copy sent to D. Morper, C/C Bur.) mbd
- 10-29-74 - Notice of Intent to Participate filed for Boeing Computer Services, Inc. (Copy sent to D. Morper, C/C Bur.) mbd
- 10-29-74 - Ltr. advising that they intend to Participate in this Proc. filed for North American Telephone Association. mbd
- 10-29-74 - Notice of Intention to file comments filed for Bunker Ramo Corporation. mbd
- 10-29-74 - Notice of Intention to file comments filed for Citicorp. mbd
- 10-29-74 - Ltr. advising that they intend to participate in this Proc. filed for International Business Machines. (Copy sent to D. Morper, C/C.) mbd
- 10-30-74 - ORDER adopted by Acting Chief, C/C Bur. directing that the time to file comments in this Proc. is extended until 12-11-74; time for file reply comments is extended until 1-23-75; time to file responses to reply comments is extended until 2-21-74 respectively. Released: 10-30-74 mbd
- 10-30-74 - Notice of Intent to file comments & reply comments filed for American Telephone and Telegraph Company. mbd
- 10-30-74 - Telegram advising that they intend to file comments and reply comments in this Proc. filed by Warren F. Prince, Vice President for Tymshare Inc. (Copy sent to D. Morper, C/C Bur.) mbd
- 10-30-74 - Notice of Intention to file comments filed for United System Service, Inc. mbd
- 10-31-74 - Notice of Intention to file comments filed for Xero-Fax, Inc. mbd
- 10-31-74 - Notice of Appearance filed for Western Union International, Inc. (Copy sent to D. Morper, C/C Bur.) mbd
- 11-21-74 - Ltr. advising that intends to file comments and reply comments in this Proc. filed by Philip M. Walker, Vice President & General Counsel for Telent Communications Corporation. (Copy sent to D. Morper, C/C Bur.) mbd
- 11-25-74 - Ltr. requesting an extension of time in which to file comments in this Proc. filed for Western Union Telegraph Company (Copy sent to D. Morper, C/C Bur.) mbd
- 11-27-74 - ORDER adopted by C/C Bur. directing that Western Union 11-25-74 Request to Extend dates for filing comments in this Proc. IS DENIED and the time for filing comments is 12-11-74; the time to file reply comments is 1-23-75; the time to file responses to reply comments is 2-21-75. Released 12-2-74. mbd/sna

11-27-74 DENIED

- 11-29-74 - Comments filed by Thomas A. Phemister, Assistant General Solicitor for Association of American Railroads. mbd
- 12-3-74 - PUBLIC NOTICE listing Participants in Shared Common Carrier Case Released. cmd
- 12-9-74 - PUBLIC NOTICE listing Additional Participants in this proc. released. cmd
- 12-11-74 - Comments filed for Xero-Fax, Inc. cmd
- 12-11-74 - Comments filed for National Retail Merchants Asso., Inc. cmd
- 12-11-74 - Comments filed for Tymshare, Inc. cmd
- 12-11-74 - Comments filed for National Association of Motor Bus Owners. cmd
- 12-11-74 - Comments filed for Central Committee on Telecommunications of the American Petroleum Institute. cmd
- 12-11-74 - Comments filed for the American Newspaper Publishers Asso. cmd
- 12-11-74 - Comments filed for the Computer and Business Equipment Manufacturers Asso. (CBEMA) cmd
- 12-11-74 - Comments filed for Western Union Telegraph Co. cmd-
- 12-11-74 - Comments filed for RCA Global Communications, Inc. cmd
- 12-11-74 - Comments filed for Graphnet Systems, Inc. cmd
- 12-11-74 - Comments filed by Eric V. Schinnerer, Director of Telecommunications for the National Association of Manufacturers. cmd/sna
- 12-11-74 - Comments filed for Citicorp, cmd
- 12-11-74 - Comments filed for Bunker Ramo Corporation, cmd
- 12-11-74 - Comments filed by Harold K. Curtis, Chrmn., and Charles M. Meenan and Carole C. Harris, Attys., for Utilities Telecommunications Council. cmd/sna
- 12-11-74 - Comments filed for American Trucking Asso., Inc. cmd
- 12-11-74 - Comments filed GTE Service Corporation, cmd
- 12-11-74 - Comments filed for the American Satellite Corp (ASC), cmd
- 12-11-74 - Comments filed for ITT World Communications, Inc. cmd
- 12-11-74 Supplemental Certificate of Service filed. cmd/sna
- 12-11-74 - Comments filed for Commodity News Services, Inc. cmd
- 12-11-74 - Comments filed for Southern Pacific Communications, Co. cmd
- 12-11-74 - Comments filed for the Associated Press, cmd
- 12-11-74 - Comments filed for AT&T, cmd
- 12-11-74 - Comments filed for United System Service, Inc. cmd
- 12-11-74 - Comments filed for Remote Processing Services Section of ADAPSO, Inc. cmd
- 12-11-74 - Comments filed for Dow Jones & Company, cmd
- 12-11-74 - Comments filed for Data Transmission Company, cmd
- 12-11-74 - Comments filed by Robert C. Hall, Pres., and Mahlon M. Frankhauser and Michael Yourshaw, Attys., for Securities Industry Automation Corporation. cmd/sna
- 12-11-74 - Comments filed by J. P. Taylor, Jr., Pres., and Charles R. Cutler and John L. Bartlett, Attys., for Aeronautical Radio, Inc. cmd/sna
- 12-11-74 - Comments by way of suppl. to and in support of Aeronautical Radio, Inc.'s Comments filed for Air Transport Association of America and Representative Member Airlines. sna

- 12-11-74 - Comments filed for Telenet Communications Corp. cmd
12-11-74 - Comments filed for the North American Telephone Assoc. cmd
12-11-74 - ^{Joint} Comments filed for MCI Telecommunications Corp., et al. cmd/sna
12-11-74 - Comments filed for Wells National Services Corp. cmd
12-11-74 - Comments filed for Packet Communications, Inc. cmd
12-11-74 - Statement that it will not file initial comments but may file reply comments filed for CML Satellite Corp. cmd/sna
12-12-74 - Comments filed for American Facsimile Services, Corp. cmd
12-13-74 - Erratum filed. sna
12-12-74 - Motn. for Leave to Accept its late filing filed for American Facsimile Services, Corp. cmd
12-12-74 - Ltr. Comments filed for Bank Wire, cmd
12-20-74 - Mot. for Ext. of Time for filing Reply comments filed for GTE Service Corp. vrj 1-8-75 DENIED (M.O.&O.)
12-24-74 - Ltr. advising that they have elected not to file comments but reserve an opportunity to prepare comments at a later date filed for Orlando Communications Club, Inc. et al & Frank J. Parrish III. vrj
12-27-74 - Notice of Intention to File Reply Comments filed for United Press International, Inc. vrj
12-30-74 - Statement in Support of the 12-20-74 Mot. for Ext. of Time filed by Philip M. Walker, Vice Pres. & Gen. Couns. & Donald E. Ward, Atty. vrj
12-31-74 - Partial Oppos. to the 12-20-74 Mot. for Ext. of Time filed for The American Trucking Assoc., Inc. vrj
1-8-75 - M.O.&O. adopted by Chief, C/C Bureau DENYING GTE's 12-20-74 Mot. for Ext. of Time for filing reply comments and that Reply Comments in this proc. will be due 2-24-75, and that Responses will be due 3-26-75. Released: 1-9-75. vrj
1-13-75 - Petn. to Require Add'l. Information urging the Comm. to require the parties filing data, comments, & information in Doc. Nos. 20003 and 20288, to also file such data, etc., in this proc., and to require that reply comments in this proc. be filed 45 days after the filing of such data, etc., filed for The Western Union Telegraph Company. vrj/sna
1-28-75 - Opposn. to Western Union's 1-13-75 Petn. to Require Additional Information filed for American Trucking Associations, Inc. jcb
2-7-75 - Motn for Ext. of Time to file Reply Comments filed for The Western Union Telegraph Company. jcb
2-10-75 - Opposn. to Western Union's 2-7-75 Motn. for Ext. of Time filed for American Trucking Association, Inc. jcb 2-12-75 DENIED
2-12-75 - ^{Joint} Comments in Support of Western Union's 2-7-75 Motn. for Ext. of Time filed for MCI Telecommunications Corporation, MCI-New York West, Inc., Interdate Communications, Inc. and Microwave Communications, Inc. jcb
2-12-75 - ORDER adopted by Chief, CC Bureau DENING Western Union's 2-7-75 Motn. for Ext. of time. Released 2-19-75. jcb
2-24-75 - Reply Comments filed for Southern Pacific Communications Co. jcb
2-24-75 - Reply Comments filed by Thomas A. Phemister, Ass't. Gen. Counsel, for Association of American Railroads. sna
2-24-75 - Reply Comments filed for the Remote Processing Services Section of the Association of Data Processing Service Organizations, Inc. jcb
2-24-75 - Reply Comments filed for Tymshare, Inc.

- Joint
- 2-24-75 - /Reply Comments filed for MCI Telecommunications Corporation, MCI-New York West, Inc., Interdata Communications, Inc. and Microwave Communications, Inc. jcb
- 2-24-75 - Reply Comments filed for United System Service, Inc. on behalf of member companies of the United Telephone system. jcb
- 2-24-75 - Letter stating that they decided not to file comments at this time filed for The International Business Machines Corp. jcb
- 2-24-75 - Reply Comments filed for The Western Union Telegraph Co. sna
- 2-24-75 - Reply Comments filed for United Press International, Inc. jcb
- 2-24-75 - Reply Comments filed for Data Transmission Company. jcb
- 2-24-75 - Statement in Lieu of Reply Comments filed for The Associated Press. jcb
- 2-24-75 - Reply Comments filed for Bunker Ramo Corporation. sna
- 2-24-75 - Reply Comments filed for Citicorp. sna
- 2-24-75 - Reply Comments filed for Graphnet Systems, Inc. jcb
- 2-24-75 - Reply Comments filed for Graphic Scanning Corporation. jcb
- 2-24-75 - Reply Comments filed for The National Association of Motor Bus Owners. jcb
- 2-24-75 - Reply Comments filed by RCA Global Communications, Inc. jcb
- 2-24-75 - Reply Comments filed for The Computer and Business Equipment Manufacturers Association. jcb
- 2-24-75 - Reply Comments filed for the Securities Industry Automation Corp. jcb
- 2-24-75 - Reply Comments filed for American Trucking Assns., Inc. sna
- 2-24-75 - Statement in Lieu of Reply Comments filed for American Newspaper Publishers Association. jcb
- 2-24-75 - Reply Comments filed by Eric Schimmel, Director of Telecommunications, National Association of Manufacturers. jcb
- 2-24-75 - Reply Comments filed for Utilities Telecommunications Council. jcb
- 2-24-75 - Reply Comments filed for XERO-FAX. jcb
- 2-24-74 - Reply Comments filed by Philip M. Walker, Vice Pres. & Gen. Counsel and Donald E. Ward, Atty. for Telenet Communications Corporation. jcb
- 2-24-75 - Reply Comments filed for the Central Committee on Telecommunications of The American Petroleum Institute. jcb
- 2-24-75 - Statement in Lieu of Reply Comments filed for Commodity News Services, Inc. jcb
- 2-24-75 - Joint Reply Comments filed for Aeronautical Radio, Inc. and The Air Transport Association of America. jcb
- 2-24-75 - Reply Comments filed for The Aerospace Industries Association of America, Inc. jcb
- 2-24-75 - Reply Comments filed for National Retail Merchants Association, Inc. jcb
- 2-24-75 - Reply Comments filed by Fred R. Simmonds, Vice Pres. - Operations and H. William Taylor, Atty. for Altair Airlines. jcb
- 2-25-75 - Letter stating that for its Reply Comments they reaffirm the views expressed in its Comments filed for ITT World Communications Inc. jcb
- 2-25-75 - Reply Comments filed for American Telephone and Telegraph Company. jcb
- 2-25-75 - Motn. for One Day Ext. of Time in which to file its Reply Comments filed for American Telephone and Telegraph Company. jcb
- 2-26-75 - Comments filed by John Eger, Acting Director, Office of Telecommunications Policy. jcb

2-24-75 -
2-24-75 see
entry pg. 20

- 2-28-75 - Statement filed for Aeronautical Radio, Inc. jcb
- 3-6-75 - Reply Statement filed for The American Trucking Assoc..
Inc. vrj
- 2-24-75 - Reply Comments & Req. for ext. of Time in which to file 3-13-75 GRANTED
Response to Reply comments filed for GTE Service Corp. vrj IN PART
- 3-13-75 - ORDER adopted by Chief, C/C Bur. directing that GTE's 2-24-75
Req. for Ext. of Time in which to file Response to Reply
Comments is GRANTED IN PART AND DENIED IN PART and the time
for filing responses to reply comments is extended to
4-25-75. Released: 3-20-75. vrj
- 3-27-75 - Comments filed by R. Chris Reece, ASUA Executive Advisor for
Associated Students of the University of Arizona. vrj
- 4-25-75 - Pet. To Intervene filed for The National Library of Medicine.
vrj
- 4-25-75 - Comments filed for the National Library of Medicine. vrj
- 4-25-75 - Mot. For Ext. of Time for filing its comments filed for
The U.S. Dept. of Justice. vrj
- 4-25-75 - Response filed by Philip M. Walker, V. Pres. & General Counsel,
Donald E. Ward, Atty., for Telenet Communications/Corporation, vrj 5-1-75-ERRATA FILED.
- 4-25-75 - Response Comments filed for Citicorp. vrj
- 4-25-75 - Response filed for American Trucking Association, Inc. vrj
- 4-25-75 - Response Comments filed for Bunker Ramo Corp. vrj
- 4-25-75 - Response Comments filed for Wells National Service Corp.
vrj
- 4-25-75 - Statement in Lieu of Responses to Reply Comments filed for
United System Service, Inc. vrj
- 4-25-75 - Fur. Comments filed for RCA Global Communications, Inc.
vrj
- 4-25-75 - Joint Response filed for The American Newspaper Publishers
Association, The Associated Press & Commodity News Services,
Inc. vrj
- 4-25-75 - Response filed for Aeronautical Radio, Inc. & The Air Transport
Association of America. vrj
- 4-25-75 - Response filed for The Securities Industry Automation Corp.
vrj
- 4-25-75 - Response filed for The National Association of Motor Bus
Owners. vrj
- 4-25-75 - Response filed for The Western Union Telegraph Company. vrj
- 4-25-75 - Response filed for The Computer & Business Equipment Manu-
facturers Association. vrj
- 4-25-75 - Response filed for The Southern Pacific Communications Co.
To Reply Comments. vrj
- 4-25-75 - Response To Reply Comments filed for Xero-Fax. vrj
- 4-25-75 - Response filed for AT&T Co. vrj
- 4-25-75 - Response filed for ITT World Communications Inc. vrj
- 4-25-75 - Response Comments filed for American Facsimile Systems, Inc.
vrj
- 4-25-75 - Response filed for The Remote Processing Services Section of
The Association of Data Processing Service Organizations, Inc.
vrj

- 4-25-75 - Response filed for GTE Service Corp. vrj
- 4-25-75 - Joint Response to Reply Comments filed for MCI Telecommunications corporation and Microwave Communications, Inc. vrj/jcb
- 4-25-75 - Response filed for Tymshare, Inc. vrj/jcb
- 4-29-75 - Response Comments filed for North American Telephone Association. vrj/jcb
- 4-29-75 - Motn. for Leave to Accept its Response for Late Filing filed for North American Telephone Association. vrj/jcb
- 5-2-75 - Response To Reply Comments filed for Data Transmission Company. vrj/jcb
- 5-2-75 - Motn. for Acceptance of its Late-Filed Response to Reply Comments filed for Data Transmission Company. vrj/jcb
- 5-2-75 - Reply Comments filed by Thomas E. Kauper, Asst. Atty. Gen., Donald I. Baker, Deputy Asst. Atty. Gen. and Barry Grossman & Ruth G. Bell, Attys. for Department of Justice. vrj/jcb
- 5-16-75 - Petn. for Acceptance of Supplemental Filing filed for Wells National Services Corporation. jcb
- 7-1-76 - REPORT & ORDER adopted directing that the policies set forth therein are effective immediately, and all common carriers subject to the jurisdiction of the Comm. shall file revised tariffs by 9-1-76 eliminating restrictions on the resale and shared use of their services which are not consistent with these policies. Any motn. for stay of the effectiveness of this action shall be filed by 8-2-76; and that this proc. IS TERMINATED. (Commr. Lee issuing a separate statement; Commr. Hooks concurring and issuing a statement; Commr. Robinson concurring in part and dissenting in part and issuing a statement at a later date). Released: 7-16-76. cmd \Erratum Released: 7-19-76. cmd Errata Released: 8-3-76
- 7-26-76 - Motn. for Postponement of the Comm.'s 7-1-76 Report and Order filed for the Western Union Telegraph Co. cmd
- 7-29-76 - Comments on Western Union's 7-26-76 Motn. for Postponement filed for AT&T. cmd
- 7-30-76 - ORDER adopted directing that the Comm.'s 7-1-76 Report and Order IS MODIFIED to specify that revised tariffs must be filed by 9-15-76 and motns. to stay the effectiveness of this action must be filed by 8-16-76. Released: 8-4-76. cmd
- *7-30-76 See pg. 12
- 8-9-76 - Motn. to permit the filing of a Petn. for Recons. in excess of the 25 page specification filed for AT&T. cmd 8-19-76 Suppl. filed 8-30-76 GRANTED
- 8-13-76 - Motn. for Stay of the Comm.'s 7-1-76 Report and Order filed for Telenet Communications Corp. cmd
- 8-16-76 - Motn. for Stay of the Comm.'s 7-1-76 Report and Order filed for TRT Telecommunications Corp. cmd
- 8-16-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order filed for TRT Telecommunications Corp. cmd
- 8-16-76 - Petn. to Stay the Comm.'s 7-1-76 Report and Order filed for Western Union International, Inc. cmd 8-23-76 Amendment filed
- 8-16-76 - Petn. for Stay of the Comm.'s 7-1-76 Report and Order filed for GTE Service Corp. cmd
- 8-16-76 - Petn. for Clarification of the Comm.'s 7-1-76 Report and Order filed for RCA Globcom System, Inc. cmd

- 8-16-76 - Req. for Stay of the Comm.'s 7-1-76 Report and Order
filed for RCA Global Communications, Inc. cmd
- 8-16-76 - Petn. for Stay of the Comm.'s 7-1-76 Report and Order
filed for the Computer and Business Equipment Manufacturers
Assoc. cmd
- 8-16-76 - Motn. for Stay of the Comm.'s 7-1-76 Report and Order
filed for Southern Pacific Communications Co. cmd
- 8-16-76 - Motn. for Stay of the Comm.'s 7-1-76 Report and Order
filed for AT&T. cmd
- 8-16-76 - Appln. for Stay of the Comm.'s 7-1-76 Report and Order
Pending Judicial Review filed for ITT World Communications,
Inc. cmd 8-18-76 - Ltr. correction filed. cmd
- 8-16-76 - Motn. for Partial Stay of the Comm.'s 7-1-76 Report and
Order filed for Aeronautical Radio, Inc. cmd
- 8-16-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order
filed for United System Service, Inc. on behalf of the
member companies of the United Telephone System. cmd
- *7-30-76 - Petn. for Review of the Comm.'s 7-1-76 Report and Order
filed for ITT World Communications, Inc. cmd
- 8-23-76 - Opposn. to AT&T's 8-16-76 Motn. for Stay filed for
American Trucking Associations, Inc. cmd
- 8-25-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order
filed for Remote Processing Services Section of ADAPSO,
Inc. cmd
- 8-25-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order
filed for International Business Machines Corp. cmd
- 8-25-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order
filed for Southern Pacific Communications Co. cmd
- 8-25-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order 9-13-76-Amended pgs.18
filed for Western Union International, Inc. cmd 9-13-76-Amended pgs. 17 & 21 filed: 19 filed. cmd
- 8-25-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order
filed for AT&T. cmd 8-26-76 Ltr. correction filed. cmd
- 8-25-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order
filed for the Computer and Business Equipment Manufacturers
Assoc. cmd
- 8-25-76 - Petn. for Recons. & Clarification of the Comm.'s 7-1-76
Report and Order filed for Telenet Communications Corp. cmd 8-30-76 Erratum
filed. cmd
- 8-25-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order
filed for GTE Service Corp. cmd
- 8-25-76 - Joint Petn. for Recons. of the Comm.'s 7-1-76 Report and
Order. filed for Aeronautical Radio, Inc. & Air Transport
Association of America. cmd
- 8-25-76 - Petn. for Recons. of the Comm.'s 7-1-76 Report and Order
filed for United Press International, Inc. cmd
- 8-25-76 - Petn. for Clarification or Recons. of the Comm.'s 7-1-76
Report and Order filed for Western Union Telegraph Co. cmd

- 8-26-76 - Ltr. requesting that the Comm.'s 7-1-76 Report and Order be corrected to indicate SIAC's ownership prior to official publication filed for Security Industry Automation Corp. cmd
- 8-26-76 - Ltr. suggesting that at the earliest opportunity the Comm. convene an informal conf. filed by James R. Billingsley, Vice Pres. for AT&T. cmd
- 8-30-76 - ORDER adopted by the Chief, C/C Bureau directing that AT&T's 8-9-76 Motn. & Supp'l Motn. IS GRANTED; and that such pleadings do not exceed 60 pages. Released: 9-2-76. cmd
- 8-31-76 - Req. for Office Notice filed for ITT World Communications, Inc. cmd
- 8-31-76 - Reply to American Trucking Assoc.'s 8-23-76 Opposn. to Motn. to Stay filed for AT&T. cmd
- 9-7-76 - Motn. to Strike AT&T's 8-31-76 Reply filed for American Trucking Assoc., Inc. cmd
- 9-8-76 - M.O.&O. adopted directing that the 7-1-76 Report and Order IS MODIFIED to provide that revised tariffs eliminating restrictions on the resale and shared use of common carrier private line services and facilities shall be filed not later than 12-15-76. Released: 9-14-76. cmd
- 9-9-76 - Comments on American Trucking's 8-25-76 Petn. for Recons. filed for Alaska Communications, Inc. cmd
- 9-24-76 - Response to the 8-16-76 & 8-25-76 Petns. for Reconsideration filed for Securities Industry Automation Corporation. mec

FCC 74-689

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
AMERICAN TRUCKING ASSOCIATION, INC.,
WASHINGTON, D.C., COMPLAINANT

Docket No. 19746

v.
AMERICAN TELEPHONE AND TELEGRAPH CO.,
NEW YORK, N.Y., DEFENDANT
REGULATORY POLICIES CONCERNING RESALE
AND SHARED USE OF COMMON SERVICES AND
FACILITIES

Docket No. 20097
RM-1997
RM-2218

NOTICE OF INQUIRY AND PROPOSED RULEMAKING
(Adopted June 26, 1974; Released July 5, 1974)

BY THE COMMISSION:

I. INTRODUCTION

1. The Commission has before it a number of matters which raise in one form or another the basic question of whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use. Resolution of this question requires the Commission to define on a broad basis the role of the middleman in the provision of communications services to the using public. While the middleman has assumed an important role in nearly all aspects of commerce throughout our nation's history, in the field of communications it has been the tradition, generally, that the carriers owning and operating transmission facilities supply a complete communications service directly to the ultimate user. Only relatively recently has this tradition, exemplified in the tariffs of the established carriers, been questioned.

2. The following is a summary of the more important tariff provisions governing resale and shared use of major carrier service offerings: With certain exceptions Private Line Services obtained from the American Telephone and Telegraph Company (AT&T) or The Western Union Telegraph Company (Western Union) may not be resold nor may the customer use the service to transmit communications for others. A customer for most voice-grade and under private line services may, however, enter into an arrangement with others to share the service obtained. AT&T's Wide Area Telecommunications Service (WATS) is not available for resale, third party traffic or shared use, except when used to provide telegram service. Message Toll Service (MTS) may not be resold; however third party traffic

is permitted so long as the customer does not derive a profit from provision of transmission service.¹

3. From the foregoing summary it is apparent that the opportunity for entities to obtain services and facilities from the established carriers to provide an augmented communications service for hire to the public is severely limited. Nevertheless a considerable number of entities have shown an interest in offering augmented communications services in such a manner. This interest has been spurred by the public's burgeoning demand for fast, efficient and low cost access to information in convenient format and the concomitant development of innovative communications technology to meet that demand. As we found in our *Specialized Common Carrier Inquiry*,² the market for non-voice communications is growing at a rapid pace, is largely undeveloped and will be satisfied only through the application of innovative communications technology. In this area of rapid technological and market development, we believe that both established carriers and the new entities which offer or propose to offer specialized services can contribute to breakthroughs in communications technology and plans for more efficient application of new and existing technology. However, entities other than the carriers who originate technological advances or propose new systems configurations may not be in the best position for a number of reasons deriving from regulatory and procedural as well as economic limitations, to undertake the construction of new lines of communication. Public enjoyment of state-of-the-art communications technology and full utilization of existing capacity may thus require that independent enterprises devoted to marketing, retailing, brokerage and related functions be given a greater role in the communications industry.

4. We are mandated by the Communications Act of 1934 to regulate interstate and foreign commerce in communications so as to make available to all the people of the United States rapid, efficient nationwide and worldwide communications services with adequate facilities at reasonable charges (47 U.S.C. § 1). As has been noted, the question of the availability of services for resale or shared use and the regulation thereof underlies various matters before us. It would be inappropriate to consider this question in the context of some particular item, such as an application for authorization of service, a tariff filing or a complaint against a particular carrier. The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved compels the conclusion that the fulfillment of our regulatory mandate requires that the questions that have been raised in the context of various discrete matters before us be considered in a broad rulemaking proceeding. We are therefore initiating this general inquiry and rulemaking proceeding to consider our policy with regard to questions concerning the resale and shared use of common carrier services and facilities. Having received the information, opinions

¹ For private line services see AT&T's Tariff F.C.C. No. 260 Section 2.2.1 and 2.2.3, and WATS Tariff F.C.C. No. 254 Sections 2.2.1 and 2.2.3. For WATS see AT&T's Tariff F.C.C. No. 253, Section 2.2.1. For MTS see AT&T's Tariff F.C.C. No. 253 Section 2.2.1.

² Docket No. 13920, First Report and Order, 29 FCC 21 870 (1971).

and recommendations of all interested parties we will be in a position to take appropriate action, including the establishment of policy guidelines, by rule or otherwise, the recommendation of any desirable legislative changes or the modification of existing carrier practices.

5. Before proceeding to discuss the issues to be considered and to set forth specific questions to be addressed, we believe it would be helpful if we described some of the existing and proposed communications services provided by means of communications facilities obtained from established common carriers.

II. COMMUNICATIONS SERVICES PROVIDED THROUGH INTERMEDIARIES

a. "Value Added" Proposals

6. A major interest in the resale of communications facilities and services has been expressed in proposals to lease wideband interexchange lines from the established communications common carriers to be utilized in the offering of nationwide computer-switched communications networks for the transmission of non-voice information. An example of this type of operation is that proposed by Packet Communications, Inc. (PCI).³ PCI intends to institute and operate a communications network providing terminal-to-computer and computer-to-computer data communications utilizing what is known as "packet-switching technology". PCI's network will involve, initially, one 50 Kilobit per second line linking each of a selected group of major population centers. The customer's computers are connected to this network by PCI-provided mini-computers or message concentrators which accept messages from computers they serve, subdivide and reformat the messages into "packets" or short bursts of information bits, store the packets as necessary and forward them to the concentrator serving the destination computer where they are reassembled into messages and sent on to the appropriate computers.⁴ Terminal access to the mini-computers or message concentrators may be accomplished by the subscriber via the public telephone system or, in the case of large users, via a leased line. The network is supervised by two Network Operations Centers which, with the mini-computers, determine routing, re-routing if necessary, check packets for errors, arrange for retransmission of packets until errors are eliminated, keep track of transmission facility reliability, and perform billing functions. PCI expects its service to provide enhanced accuracy, reliability and privacy of communication, significantly increased, more economical utilization of transmission line capacity, as well as end-to-end-responsibility and communications management services.

7. Graphnet Systems, Inc. (Graphnet)⁵ proposes to establish a similar network primarily devoted to the specialized field of terminal-to-terminal communications and capable of accommodating a great variety of terminals such as telecopiers, telex and TWX printers. The subscriber, who pays a small monthly network access charge as

³ Section 214 Application granted, 43 F.C.C. 2d 922 (1973).

⁴ PCI will offer no data processing services (i.e., storing, retrieving, sorting, merging and calculating of data) but will utilize such data processing as is necessary to perform the function of message switching.

⁵ Section 214 Application granted, 44 F.C.C. 2d 900 (1974).

well as a rate based on minutes of use, may choose various methods of delivery including messenger if no terminal is available at his message's destination. Applications have also been received from the MCI Data Transfer Corporation (MDT) (FCC File No. P-C-8589) and Telenet Communications Corp.⁶ Others have indicated that they will be filing similar applications in the near future.

b. Line Sharing or Joint Use Arrangements

8. AT&T and Western Union provide in their Private Line Service tariffs that customers who have need of voice grade and under private lines services (for their own use) may enter into arrangements with other users for the sharing of the capacity of the line or lines jointly used, the proportion being determined by agreement between the customer and joint users. The Commission has not formally investigated the extent to which the joint user provisions are utilized nor reviewed arrangements between customers and joint users except in a few isolated instances which have been brought to our attention. Sharing arrangements can range from the simple cooperative use of a single channel from one point to another, or the provision of discrete sub-channels derived from a voice grade channel, up to complex networks which the joint users may access from a number of points and which may be conditioned for the carriage of communications of a specialized nature. One of the more complex arrangements which has been brought to our attention is being organized by the RCA Corporation. Originally RCA proposed to commence operations with approximately 40 to 45 voice grade links serving approximately 25 cities. The presently proposed network is more modest, providing for service between five cities coast to coast—one voice grade circuit linking each, forming a continuous, distributed communications network. The system is to be managed by RCA Global Communications, Inc., and RCA will provide the multiplexing equipment (which will not be of RCA manufacture). The users may attach any additional terminal equipment desired so long as no harm results to the system. Apart from the pro-rata share of the transmission charges, the joint user pays RCA a management fee which is computed on the basis of mileage of the network used, number of access points and speed of communication desired.

9. Another arrangement currently in operation provides the data communications user a service much the same as that proposed by PCI and others (although it is provided over low speed voicegrade lines). Tymshare, Inc., a major data communications and processing enterprise, operates a national and international data communications network called Tymnet. As of April, 1973, Tymnet connected 54 cities with 37 large scale computers utilizing over 40,000 miles of leased telephone lines. Under a joint use arrangement other companies have been allowed to access their own computers via Tymnet. In such instances Tymnet's computers are used to route data but do no processing. The user pays the common carrier for its share of the transmission line usage and then pays Tymshare on the basis of terminal connect time, number of connections made and the volume of information transmitted. The Tymnet-type sharing operation is significant in that as

⁶ Section 214 Application granted, 48 F.C.C. 2d — (1974).

the joint user is not provided with his own discrete channels, the number of possible users is limited only by the aggregate use made of the available capacity by all users.

c. Facsimile Communication Networks

10. Another identifiable class of resale operations are enterprises which organize facsimile communications networks, utilizing telecopiers and the message toll telephone system, for the use of the general public. Typically the telecopiers are placed with established businesses and the network organizer provides each agent with a directory containing the location and telephone number of all other outlets. The licensee or agent then holds himself out to the public to send communications in facsimile form to any other location on the network, charging the user a fee plus the charge for the telephone call by which transmission is effectuated. The fee is then split with the receiving agent and the network organizer. It is believed that some of these operations are extensive, involving over 300 outlets coast-to-coast.

d. Hybrid Communications and Processing Services

11. There are also a considerable number of services available which provide a mixture of information communications and processing. An example is services which arrange for the procurement and communication of permits, documents and money orders for the trucking industry. Others serve banks, the securities industry and law firms. Transmission is typically by means of the message toll telephone system accessed by specialized terminals such as telecopiers although WATS and other communications services may sometimes be involved.¹

12. For purposes of defining the breadth of our examination of hybrid service offerings we refer to the guidelines set forth in our *Computer Inquiry*² to distinguish those offering communications from those offering essentially a processing service:

If . . . the package offering is oriented essentially to satisfy the communications or message-switching requirements of the subscriber, and the data processing feature or function is an integral part of and incidental to message-switching, the entire service will be treated as a communications service for hire, whether offered by a common carrier or non-common carrier and will be subject to regulation under the Communications Act. One applicable test will be whether the service, by virtue of its message-switching capability, has the attributes of point-to-point services offered by conventional communications common carriers and is, basically, a substitute therefor.³

While we were there considering the function of the computer in the provision of a communications service, the principle involved also extends to examination of other processing operations such as formatting, arranging service with governmental agencies, providing needed forms, etc., in determining whether the overall service should be considered communications or processing for our regulatory purposes.

e. Single Customers Tariff Provisions

13. There are exceptions to the prohibition on the resale of private line services (known as the "single customer" provisions in the tariffs

¹ The Commission regularly receives inquiries in regard to the initiation of various services of a hybrid nature which would utilize such services as WATS, MTS, TELEX and TWX as well as private line services.

² Final Decision and Order, Docket No. 18970, 28 F.C.C. 2d 267 (1971).

³ Tentative Decision, Docket No. 18970, 28 FCC 2d 291 (1970), para. 42.

of AT&T and Western Union) which allow certain customers to obtain communications services for specified groups of users¹⁰ and allow the specified user groups—such as the airlines, stock exchanges, and electric power pools—to enjoy any administrative convenience that may result from buying communications services in conjunction with others, but more importantly, may allow communications services to be ordered under TELPAK discount rates which would not be available to the users taken singly.

14. We have already initiated an investigation¹¹ under Section 202 (a) of the Act to determine if these provisions, in that they extend special tariff treatment to specified users, involve under discrimination. We will discuss below, the relationship between the issues in that investigation and those to be considered in this proceeding.

III. DISCUSSION OF ISSUES

a. Resale

15. At the threshold in this inquiry we meet the question of whether and to what extent the services and facilities of communications common carriers ought to be available for use by intermediaries in offering augmented communications services to the public. Of principle concern is the availability of private line services which are presently offered under the following conditions set forth in AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254:

- 2.2.1 A private line service may be used . . .
 - (A) For the transmission of communications to or from the customer and relating directly to the customer's business.
- 2.2.3 Private line services shall not be used for any purpose for which a payment or other compensation shall be received by . . . the customer . . . or in the collection, transmission or delivery of any communications for others . . .

2.5 Definitions

Customer . . . No one may be a customer for a private line service who does not have a communications need of his own.¹²

16. The carriers have never been called upon, either formally or informally, to justify these tariff provisions. In view of the currently developing interest in securing private line services for resale we believe that it is now incumbent upon us to question whether the public interest is served by a continuation of these restrictions on the availability of common carrier facilities and services. A primary issue to be considered in this proceeding, then, is whether the above-quoted tariff provisions are just and reasonable under Section 210(b) and not unduly discriminatory under 202(a) of the Communications Act of 1934. The carriers are here given an opportunity to respond with evidence in justification of their tariffs and other participating parties have opportunity to comment on the carrier's presentations.

¹⁰ AT&T Tariff F.C.C. No. 260, Section 2.2.1 and Western Union Tariff F.C.C. No. 254, Section 2.2.1.
¹¹ American Trucking Association v. AT&T, Docket No. 19740, 41 FCC 2d 2 (1973).
¹² Exceptions to these provisions, which are the subject of our investigation in Docket No. 19740, have been deleted.

17. Our inquiry of course goes beyond an examination of the presently effective tariffs and we are inviting all recommendations for tariff structures which will best serve whatever public interest there may be in securing carrier services and facilities for resale purposes. We have reason to believe that the carriers themselves may wish to suggest changes to their present tariffs. For example, AT&T has requested permission¹² to amend its private line tariff to allow resale and third party traffic where the customer intends to provide a "Composite Data Service", which is defined in the proposed tariff as follows:

Composite Data Service

The term "Composite Data Service" denotes an offering which combines the use of computers and terminal equipment with the use of communication services of the Telephone Company to provide a single integrated data service for data processing and data message switching, or for data message switching.

It would be premature at this time for us to comment on whether the proposed tariff changes applicable to Composite Data Service Vendors meet the standards of reasonableness under Section 201(b) and 202(a) of the Act. Pending action on these filed tariff changes for the purpose of this proceeding we will consider such proposal as a recommended tariff change to be considered in the same manner as other recommendations as may be put forth by participants in this proceeding. We expect that all recommendations for desirable tariff changes will be fully justified in such manner as to permit the Commission to determine if such change would meet the standard of reasonableness contained in Section 201(b) and 202(a) of the Act.

18. While we have discussed the resale issue in terms of private line services, we want to make clear that our inquiry includes consideration of what our policy should be in regard to resale of all communications common carrier services. Proposals and inquiries received by the Commission as well as reports of services in operation lead us to believe that there is substantial interest in subscribing to MTS, WATS, Telex, and possibly other services, for resale purposes. There may also be interest in making the more specialized service of the established carriers themselves available for resale by subscribers. For example AT&T has recently filed a new tariff for a service to be known as Dataphone Digital Service¹³ which is to be provided over a discrete digital network utilizing in part a technology known as Data Under Voice (DUV).¹⁴ This proposed tariff does provide for utilization of the DDS network in the provision of service to the public by other common carriers under certain conditions. We believe that there may be interest in the resale of various common carrier services and will expect participants in this proceeding to carefully specify the services to which their comments are applicable.

¹² AT&T Application 931. In a separate action (Special Permission No. 6527, November 14, 1973) this request has been granted under delegated authority by the Chief, Common Carrier Bureau and the tariff changes may be filed on 60 days notice. The new tariff provisions regarding Composite Data Service were filed on June 19, 1974.

¹³ Tariff F.C.C. No. 267 filed March 19, 1974 in Transmittal No. 11990.

¹⁴ DUV allows a presently unused segment of the radio frequency bandwidth on existing 4 GHz and 6 GHz microwave channels to be used to transmit information in digital form thus increasing the utilization of existing facilities as well as the microwave radio spectrum. Authority to construct facilities to connect five cities was granted on June 21, 1973, P.C. 8490, 41 F.C.C. 2d 586 (1973). Now on file is an application to connect an additional 19 cities.

¹⁵ 47 F.C.C. 2d

b. Line Sharing or Joint Use Arrangements

19. As we have noted above, a customer for private line service can effectuate a line sharing arrangement which may make available to a more or less limited number of communications users a broad range of services from discrete low speed point-to-point linked communication, up to complex computer-switched networks conditioned for specialized communications. The principal advantage of sharing arrangements is economic—both the customer and the joint users enjoy communications capacity at a lower cost than if each were being supplied directly by the carrier. In some cases, however, certain users and user groups may also enter into sharing arrangements primarily to gain access to communications networks of a specialized nature. We believe that sharing arrangements as are now possible result in greater access to and fuller utilization of our nation's communications capacity and we believe their continuation is warranted.

20. In this inquiry we will consider four broad issues with regard to sharing arrangements. These are: 1) determination of the justness and reasonableness of tariff provisions under which sharing is presently permitted;¹⁶ 2) examination of the public interest in allowing sharing on above-voice grade private line services and other carrier services;¹⁷ 3) a determination of the extent to which sharing arrangements would still be useful and desirable in the event that we find that resale of facilities should be more widely permitted, and 4) inquiry into the need for regulation of sharing arrangements themselves.

21. With respect to this latter issue, Microwave Communications, Inc. (MCI) in its Petition for Rulemaking (RM. 1997) filed June 13, 1972 requested that we adopt a rule which would spell out procedures to be followed and standards to be met by bona fide sharers of the cost of communications facilities in terms similar to those of Section 93.4 of our Rules. The referenced rules, dealing with the cooperative use of radio stations in the Land Transportation Services, basically require cooperative arrangements to be reported to the Commission so that we can insure that cooperation is on a cost-sharing, non-profit basis.¹⁸ In

¹⁶ For example the customer who initiates a sharing arrangement must have a communications need of his own. Tariff provisions affecting sharing are found in Section 2.2.1 & 2.3, 2.1.5 of AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254.

¹⁷ Sharing is not permitted on services which utilize, in whole or in part, above voice-grade channels (Series 7000, 8000 or 10,000 as well as services obtained under Series 3000).

¹⁸ See the following:

193.4 Cooperative use of fixed radio stations.

(a) Licensees and persons eligible to become licensees of operational fixed stations under this part may make cooperative use of such licensed facilities under the conditions and subject to the limitations specified in this section.

(b) Licensed facilities may be cooperatively used under this section only (1) without charge to any of the participants in its use, or (2) on a non-profit, cost-sharing basis pursuant to a written contract between the parties involved which provides that the licensee shall have control of the licensed facilities and that contributions to capital and operating expenses are accounted only on a cost-sharing non-profit basis, prorated equitably, among all participants using the facilities, or (3) on a reciprocal basis, i.e., use of one licensee's facilities in exchange for the use of another licensee's facilities, without charge for either capital or operating expense, pursuant to a written contract between the licensees involved.

(c) Each licensee sharing its facilities under this section shall maintain records showing the cost of the facilities and their operation and use, the charges made to and payments made by each of those using the facilities or contributing to their capital

(Continued)

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this proceeding we will consider adopting procedures and guidelines to be followed by carriers and customers wishing to share the cost of private line facilities.

c. Single Customer Tariff Provisions

22. As had been noted, the single customer tariff provisions, found at Section 2.2.1 of the private line tariffs of both AT&T and Western Union permit certain customers to order communications services for users having a specified relationship to the customer. For example, stock exchanges can order services

"for the transmission of communications to or from an exchange member located on the floor of such exchange and relating directly to the business of the member."

Aeronautical Radio, Inc. may order service "for the transmission of communications to, from, within and between air carriers." In effect, these provisions are exceptions to the prohibitions on resale and third party traffic and the conditions on the availability of line sharing, which are the subject matter of this proceeding. Question has been raised as to whether such exemptions for specified user groups constitute undue discrimination prohibited by Section 202(a) of the Act. We have initiated an investigation in Docket 19746 to consider this question and to determine, if such discrimination is found to exist, whether we ought to prescribe tariff changes which would be just and reasonable.

(Continued)

cost or operating expense, and the information specified below, and such records shall be available for inspection by the Commission.

(f) Each licensee sharing its facilities under this section shall file a notification with the Commission 30 days prior to the use of its facilities by any other person that has not been specified in its license application or in a prior notification to the Commission containing the following information:

(1) Name and description of the licensee;

(2) Call sign of the station or stations;

(3) The radio service in which the station is licensed;

(4) The names of all prospective participants in the cooperative use of the station and a description of each participant sufficient to show its eligibility to use the frequencies assigned to the station; and

(5) A copy of the contract between the parties for the cooperative use of the facilities.

(2) The licensee may institute the service described in the notification filed pursuant to paragraph (f) of this section 30 days after filing unless the Commission during that period notifies the licensee that the information supplied is inadequate or that the proposed service is not authorized under these regulations, and the licensee shall then have the right to amend or to file another notification to remedy the inadequacy or defect and to institute service 30 days thereafter, or at such earlier date as the Commission may set upon finding that the inadequacy or defect has been remedied.

(h) Each licensee sharing its facilities under this section on a non-profit, cost-sharing basis shall file an annual report with the Commission, using FCC Form 402-A, within 90 days of the close of its fiscal year containing:

(1) A financial statement of operations during the preceding fiscal year in sufficient detail to show compliance with the requirements of this section;

(2) The names of those who have shared the use of the facilities during the preceding fiscal year;

(3) A brief statement as to the use of the facilities made by each person sharing the use and an estimate of the approximate percentage of use by each participant during the preceding fiscal year; and

(4) Any change in the items previously reported to the Commission concerning such facilities or their use in the application for the license or in a notification under this section.

(i) When radio facilities are shared under the provisions of this section without charge and without any other consideration from any other participants, or on a reciprocal basis, or when the facilities are shared solely by governmental entities, in lieu of the statements required to be filed by paragraph (h) of this section, the licensee shall file with the Commission within 90 days after the close of his fiscal year a statement advising the Commission of that fact.

(j) The licensee shall inform the Commission whenever the cooperative use of any of its facilities in accordance with this section is permanently discontinued.

23. In view of the close interrelationships between the single customer provisions and the tariff provisions governing resale, third party traffic and line sharing, we believe that the issues set for investigation in Docket 19746 should be considered in this proceeding in conjunction with the determination of our policy with regard to resale and sharing. Accordingly we are consolidating the issues under investigation in Docket 19746 with this proceeding.

24. We recognize that such a consolidation involves a procedural change as we set an oral hearing in Docket 19746 and in this proceeding are requesting participation in the form of written submissions. Considering the nature of the evidence to be adduced and the number of parties which can be expected to participate, however, we believe that the issues relating to the single customer provisions can be more expeditiously resolved through the submission of evidence in written form without prejudicing the rights of parties to participate in their resolution.

25. We expect to receive evidence that is "typical" of the groups that do and those that do not enjoy a single customer status. Data concerning groups that do enjoy single customer status must be weighed in light of comparable data relating to user groups that are not specified as single customers. Such descriptive type information is more conveniently received in written form rather than through oral proceedings. Also, a considerable number of parties representing a broad range of interests have intervened in Docket 19746. The oral process declines in effectiveness as the number of participants, and especially the number of diverse viewpoints to be presented, increases. Parties with limited resources, but with real interest in the issues, may find an extended oral proceeding to be a considerable financial burden. We expect to encourage more broadly based participation by requesting information in writing rather than requiring appearance at oral hearings. Further, we note that Western Union's tariff contains, verbatim, many of AT&T's single customer provisions as well as some not contained in AT&T's tariff. Yet presently Western Union is not a party respondent in that investigation and has not intervened. If issues with regard to single customer tariff provisions are to be finally resolved the Western Union tariff provisions should be included as an issue to be addressed along with those of AT&T. This addition then should bring additional participants to our investigation of single customer provisions which will further complicate the hearing proceeding. For these reasons, then, we believe that public participation in our investigation of the single customer tariff provisions will be expedited in a fully satisfactory manner by the submission of statements in written form and do not believe that parties will be prejudiced if such issues are considered in this proceeding. However, as we are providing with regard to all issues herein, we will set oral proceedings on specific issues should parties make a showing that they would be prejudiced unless oral proceedings are held.

IV. REGULATION OF SERVICE PROVIDERS

26. Entirely separate from issues relating to the availability of communications services and facilities for resale or shared use pur-

poses is consideration of the extent to which entities proposing to resell services or arrange line sharing should be regulated by this Commission. For example, we may find that it would be inappropriate to measure performance in terms of rate of return or investment to such entities. We may find that different application procedures and reporting procedures should be developed to allow for better Commission surveillance of particular segments of the communications industry affected by resale and shared use of facilities and services. We consider issues relating to the manner in which resale entities should be regulated to be as significant to the established carriers and the public as are the basic questions concerning the availability of facilities for resale or shared use purposes.

27. PCL, Graphnet, MDT and Telenet have all filed for Section 214 certification on condition that it is required. When determining the reach of our regulatory jurisdiction under Section 214 the principle question is whether or not a communications service for hire is being offered to the public and not on the operational characteristics of the provider. It is well settled that Section 214 authorization is required for the operation of, or transmission over or by means of, interstate lines derived from another carrier's plant.²⁷ We believe that it is clear, under the *MacKay* decision, that the proposals for computer-switched data communications networks which we have received do require Section 214 operating authority and are generally subject to regulation under the Communications Act.²⁸

28. We do not at this time have sufficient information to determine if facsimile communications services and hybrid communications and processing services which are now operational or proposed are all subject to our regulatory jurisdiction. We note however that our jurisdiction is broad and extends to services the primary thrust of which is communications and also to services of non-communications nature provided by communications common carriers. We recognize however, as we did in our *Computer Inquiry*,²⁹ that the public interest may not require such full assertion of regulatory jurisdiction as is exercised over the established carriers which own and operate their own lines of communication. Therefore we believe the best approach to jurisdictional questions is to examine, without regard to the actual limits of our present jurisdiction, the extent to which this Commission ought to regulate the various forms of resale and sharing entities. At that point we can determine if we presently have sufficient legal authority to assert any regulatory jurisdiction we find to be desirable. To the extent that we find the public interest would be served by regulation that is not authorized by law, we can thereupon recommend any necessary legislative changes.³⁰

29. Western Union filed a petition on June 25, 1973 requesting that the Commission initiate a proceeding, analogous to the *Specialized Common Carrier Inquiry*, to examine, as a prerequisite to the consideration of any Section 214 application, the public need for services pro-

²⁷ *MacKay Radio and Telegraph Company*, 6 FCC 362 (1928).

²⁸ See *Computer Inquiry*, Tentative Decision, 28 F.C.C. 2d 291 (1970), para. 42.

²⁹ *Ibid.*, paras. 18-23.

³⁰ Pending the resolution of this proceeding we will, of course, require 214 applications of entities which propose services comparable to Packet, Graphnet and Telenet or which propose other services for which we have required 214 authorizations in the past.

vided in a resale manner and the competitive impact of such services on the established carriers (RM 2218). Of the five issues specifically suggested by Western Union for inclusion in a rulemaking proceeding, three are of a general nature which we believe are implicitly within the scope of this proceeding and which must be considered as a prerequisite to establishing general policies with regard to the resale of common carrier services and facilities. These issues are:

1. Whether as a general policy the public interest would be served by permitting the entry of "value-added" or "pseudo carriers" to compete with the specialized and general purpose carriers.
2. Whether the further fragmentation of the industry which would result from establishment of resale-type services in competition with essential primary services now available from general purpose carriers is in the public interest.
3. Whether the proliferation of "value-added" carriers which will rely on facilities obtained primarily from Bell will promote or restrict competition.
4. Western Union also suggests that we include the following issues in a general rulemaking proceeding:
 4. What would the impact of competition of the nature provided by "value-added" and "pseudo carriers" be on Western Union's ability to perform its common carrier obligations under the Communications Act.
 5. Whether competition of the nature provided by the "value-added" and "pseudo carriers" with the prime services of Western Union is in the public interest.

These issues are more specifically directed to the impact of new services on Western Union's operations. In view of the diversity of new services being provided and which are proposed or can reasonably be expected, we believe that a blanket determination of their competitive impact on Western Union can not be made. We do not have the situation which led to our *Specialized Common Carrier Inquiry* where a multitude of applications were filed in the same time frame to provide the same markets with similar type services. Here we do not have Section 214 applications before us and so may not receive sufficient information with regard to specific services to determine if there will be adverse competitive impact on Western Union. However, we will not preclude Western Union and other interested parties from addressing the above issues in this proceeding. Having received the submissions of parties relevant to these issues we will consider whether such issues can be resolved in this proceeding or should only be considered in the context of specific applications for Section 214 authority along with other issues relative to the public interest, convenience and necessity for the particular service under consideration. We will not in the interim delay consideration of Section 214 applications as they are filed and Western Union has full opportunity to submit information in response to any such applications relative to competitive impact. Even assuming that we did believe at this time that the issues of competitive impact could be resolved in a general rulemaking proceeding, we do not believe that applications should be held up pending such resolution. An essential feature of many of the services which West-

ern Union would have us consider in a rulemaking proceeding is that they would extend to the public the advantages of state-of-the-art communications technology. In view of the fast pace of technological developments, prompt consideration of the public interest in such services is vital. In summary, then, the issues raised in RM. 2218 are to be considered in this proceeding.

V. ITEMS OF INQUIRY

31. We request that parties in this proceeding specifically address the following questions:

1. What is the justification for the restrictions on resale and third party traffic in the currently effective private line service of AT&T and Western Union?

2. Would the public interest be served by a removal of all restrictions on resale of private line services? What would the effect thereof be on:

- a. AT&T and Western Union: Consider the impact on such factors as facilities fill and planning, traffic volumes, revenues, and rate of return for the company as a whole and by affected service or particular route.

- b. The Communications Industry apart from AT&T and Western Union: How would removal of resale restrictions affect the viability of other carriers with their own lines of communication, the stimulation of research and development, the market for new equipment, the development of new carriers, the stimulation of the market for wire and radio communications?

- c. Communications users: Discuss possible new services, new pricing structures, effect on cost of existing services, better communications management and stimulation of the use of the most efficient type of carrier for each type of service.

3. If a total removal of restrictions on resale is not desirable what specific restrictions are recommended? Fully justify any recommended restrictions and discuss in terms of the factors listed in question two.

4. Consider restrictions on resale of other services of AT&T, Western Union and other carriers in the same manner as called for by questions one, two and three above.

5. What is the justification for limiting the sharing of private line services to, generally, voice grade and under services and for requiring those desiring to effectuate a sharing arrangement to have a communications need of their own?

6. Would the public interest be better served by removing all restrictions on the sharing of private line facilities? If that would not be desirable, recommend necessary or desirable restrictions and justify any recommendations taking into consideration the effect of each on the carriers, other elements of the communications industry and the using public.

7. What is the public need for sharing of private line facilities? Discuss any new technologies being developed which would make sharing more attractive, new user applications of sharing and the relationship between the need for sharing and the availability of

facilities for resale. Specifically, what need for sharing would remain if all restrictions on the resale of private line facilities were eliminated?

8. What is the need for sharing of other services of AT&T and Western Union as well as the services of any other communications common carrier?

9. What is the justification for provisions of Section 2.2.1 of AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254 which accord special tariff treatment to the airlines, corporate conglomerates, stock exchanges and their members, and others? Do such tariff provisions constitute in whole or in part, unjust or unreasonable discrimination, or subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202 (a) of the Communications Act?

10. Should the provisions under consideration in question 9 be found to involve unlawful discriminations, what action should the Commission take to remove such unlawfulness? Fully justify any recommended tariff changes and discuss their consistency with any recommended changes with regard to resale and shared use of private line facilities in general.

11. Should the Commission regulate the sharing agreement made between customers and joint users and, if so, to what extent and in what manner? What reports should be required? Specifically consider possible guidelines governing the manner in which the cost of effectuating the sharing arrangement should be shared so that there is a clear distinction between sharing and resale?

12. How should the Commission regulate the entities reselling communications services and facilities? If in some instances full regulation would not be desirable recommend the manner and extent to which regulation is desirable. Specifically consider the most desirable manner of rate regulation for the various types of resale entities. For such entities would the setting of rates on the basis of operating ratios rather than rate base-rate of return be more effective? What accounting system and financial reporting should be required? What regulation over commencement of operation, standards of service and termination of service is desirable?

PROCEDURES

32. The primary objective of this proceeding is the acquisition of information which will enable the Commission to establish policies with regard to resale and shared use of common carrier facilities and services and to take action necessary to effectuate such policies. Consistent with judicial opinion that administrative agencies should tailor their proceedings to fit the issues to be considered and the circumstances under which decisions must be made²², we are establishing a

²² See, *Permanian Basin Area Rate Cases*, 390 U.S. 747 (1968); see also *City of Chicago v. FPC*, 453 F.2d 731 (1971) cert. denied, 405 U.S. 1071 (1972). We have taken the initiative in the past to establish special procedures in particular cases. See, *Specialized Common Carrier Inquiry*, 29 F.C.C. 2d 870 (1971); *Domsat Inquiry*, 2 F.C.C. 2d 86 (1970); 35 F.C.C. 2d 844 (1972); In the Matter of AT&T's High Density-Low Density Structure (procedural order), 45 F.C.C. 2d 88 (1974).

procedure here to elicit the information we require in an efficient and expeditious manner.

33. The Administrative Procedure Act²³, which governs proceedings before administrative agencies, sets forth two basic procedures for use in agency rulemaking and adjudicatory proceedings. These may be viewed as providing the outer boundaries of administrative procedures²⁴. The procedures of Sections 556 and 557 of that Act, which represent the highest degree of administrative protection that Congress believed would be necessary to protect interested parties, are not required for proceedings initiated under any of the sections of the Communications Act which authorize this proceeding.²⁵ While we believe that the procedures of Section 553, governing the so-called "notice and comment" rulemaking proceedings, are legally sufficient here to accomplish our purposes we are establishing a procedure containing elements of both Section 553 and Sections 556 and 557 proceedings to insure that a complete and accurate record is produced.

34. Since the heart of this proceeding is to establish broad policies, we believe that it is most appropriate to invite public participation through the submission of comment, information, criticism and recommendation in written form as is generally the case in Section 553 "notice and comment" rulemakings. In addition to the comments and reply comments customarily allowed in such rulemaking proceedings,²⁶ we will provide for a third round of submissions to allow those filing comments to respond to persons filing reply comments. Our decision will take into account and be limited to, materials submitted in this proceeding by interested persons or incorporated into the record of this proceeding by the Commission.²⁷ Finally, we will consider requests for further proceedings should interested persons believe that they are being prejudiced by the procedures established. Such requests should be specific as to the issue requiring further evidence and the reasons why prejudice will result if such further proceedings are not held.²⁸

35. Parties should clearly indicate in their responses the questions addressed. Information on other relevant subjects may also be submitted as well as recommendations for additional issues which might well be addressed. In general, all studies should be in conformity to Section 1.363 of the Commission's rules (47 C.F.R. 1.363). Where allegations are made of financial harm to any carriers or any segment of the public, the studies underlying these allegations should be submitted. When no study has been done, because of unavailability of

²³ Administrative Procedure Act, 5 U.S.C. § 551 ff.

²⁴ *Mobile Oil Corp. v. FCC*, 481 F. 2d 1228 (1973) and cases cited therein at footnotes 41-49.

²⁵ For Sections 556 and 557 procedures to be required the statutory hearing requirement must include the phrase "on the record" or words of similar import. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973); *Phillips Petroleum Co. v. FCC*, 475 F. 2d 842 (10th Cir. 1973) cert. denied, ___ U.S. ___ (January 11, 1974). For application of this judicial interpretation to sections of the Communications Act see the High Density Low Density procedural order, *supra*, note 21, and in the Matter of Bell System Trial Offerings of Local Distribution Facilities for Use by Other Common Carriers, Docket No. 19896, 46 F.C.C. 2d ___ (April 23, 1974; FCC 74-457).

²⁶ See our Rules at 47 C.F.R. § 1.411 ff.

²⁷ In the event that materials not submitted by participants are incorporated into the record, notice and opportunity to comment thereon will be provided.

²⁸ We note that even where the APA Sections 556 and 557 procedures are required that evidence may be submitted in written form in rulemaking cases "when a party will not be prejudiced thereby". 15 U.S.C. 556(d).

47 F.C.C. 2d

data or other reasons, an explanation of the difficulties should be appended, along with a complete discussion of the necessary study. Where loss of traffic or revenues, or an increase in cost is alleged, identify the specific services and routes in question. Revenue loss should be shown in dollar amounts and as a change in the rate of return (expressed as a percentage point change after adjusting for cost changes).

36. Accordingly, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 205, 208 and 403 of the Communications Act of 1934, as amended, there is hereby instituted an inquiry and proposed rulemaking into the foregoing matters. Members of the public are put on notice that any policies which may be established in this proceeding may be embodied in rules of the Commission.

37. IT IS FURTHER ORDERED, That Docket 19746 is TERMINATED and the issues set for investigation therein are to be considered in this inquiry.

38. IT IS FURTHER ORDERED, That the Petition for Inquiry and Rulemaking filed by Western Union (RM. 2218) is hereby GRANTED, to the extent described herein.

39. IT IS FURTHER ORDERED, That all interested persons may participate in accordance with procedures set forth above within the following time period. Comments are to be filed on or before September 9, 1974; reply comments are to be filed on or before October 24, 1974; responses to reply comments are to be filed on or before November 25, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. Should participants believe that further proceedings, including oral hearings are needed to develop a sufficient record for the resolution of particular issues, they should make appropriate requests as part of their final filing allowed by this paragraph. Such requests should be specific as to the issues to be considered, the nature of the proceedings required and the reason such proceedings are necessary.

40. IT IS FURTHER ORDERED, That the Commission will issue a First Report and Order and will designate therein issues to be investigated in oral hearings, if and to the extent such procedures appear necessary or appropriate. This is a restricted proceeding and any action taken by the Commission will be based on matters submitted for the record or incorporated into the record in this Docket.

41. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs and other documents shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLANS, *Secretary*,
47 F.C.C. 24

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 76-641
41492

28

In the Matter of)
)
REGULATORY POLICIES CONCERNING RESALE) Docket No. 20097
AND SHARED USE OF COMMON CARRIER) RM-1997

REPORT AND ORDER

Adopted:

Released: July 16, 1976

By the Commission: Commissioner Lee issuing a separate statement;
Commissioner Hooks concurring and issuing a statement;
Commissioner Robinson concurring in part and dissenting in
part and issuing a statement at a later date.

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INTRODUCTION

1. In the Notice of Inquiry and Proposed Rulemaking in this proceeding (hereafter referred to as the Notice), 47 F.C.C. 2d 644 (1974), we invited comments on a number of issues 1/ which raised, in various forms, the basic question:

. . .whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use.

In the Notice, we provided for three rounds of comments. Thirty-nine parties submitted initial comments, 36 parties submitted reply comments, and 23 parties submitted response comments. These parties are identified in Appendix C. Pursuant to our order in Resale and Shared Use of Common Services, 48 F.C.C. 2d 1077 (1974), comments and reply comments were served on all parties which expressed an intent to participate.

2. We stated in the Notice that the issues in this proceeding were complex and that they must be resolved with expedition in a broad rulemaking proceeding, even though they have been raised in the context of various discrete matters. Accordingly, we provided for the "notice and comment" procedure adopted herein, instead of oral evidentiary hearings, and took appropriate action to insure that

1/ The issues in this proceeding are set forth in Appendices A and B. In Resale and Shared Use of Common Services, 48 F.C.C. 2d 1077 (1974), we denied MCI's petition to enlarge the issues in this proceeding to include consideration of the need for revisions in the Uniform System of Accounts.

prejudice to the parties would not result therefrom. Although we set forth in the Notice the legal basis supporting our procedure in this proceeding, we have again considered the legality of our decision not to hold oral evidentiary hearings. Because this matter warrants extensive comment on a discrete issue, we have set forth in Appendix D the applicable legal principles establishing the propriety of our decision to proceed with "notice and comment" procedures. We also stated in the Notice (paragraph 40) that we would issue a First Report and Order after receipt and consideration of the comments, thereafter designating for oral hearings other issues as required. However, we have determined that the record before us is adequate for resolution of the issues in this proceeding and we therefore terminate this proceeding with this Report and Order. As is evident from the discussion below, the issues raise complex questions which are not easily considered independent of each other, and which warrant rather extensive comment. We therefore believe that it would be helpful at this point to summarize the decision before setting forth the detailed support for our conclusions.

SUMMARY OF DECISION

3. This proceeding was brought about by several discrete considerations which relate to the basic question set forth in paragraph 1, supra. Proceedings before the Commission in recent years have manifested a substantially untapped, growing public need for non-voice communications which might be satisfied in part by entities which do not own their own transmission facilities. Moreover, there are entities desiring to provide a communications service which "adds value" to or "augments" the communications service provided by existing carriers; this "augmented" service may include voice as well as non-voice communications. When we considered the applications of entities for certification as common carriers which did not own their transmission facilities, we recognized that certain issues were more appropriately considered in the context of a broad rulemaking proceeding such as this. ^{2/} In addition, we had before us a complaint filed by a user group which was denied communications service because it was an intermediary for members of an industry group and as such did not meet certain tariff requirements. Finally, two carriers filed petitions for rulemaking which involved questions regarding the regulation of joint users of communications service, and the extent to which additional carriers should be certificated to provide a "value added" or "augmented" communications service.

^{2/} In a similar situation, we provided for "notice and comment" procedures instead of a formal, oral hearing. See Specialized Common Carrier Inquiry, 29 F.C.C. 2d 870 (1971), aff'd sub nom. Washington Utilities and Transportation Comm. v. F.C.C., 513 F. 2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975).

4. The above matters all relate to the existence of provisions in the tariffs of carriers which restrict or prohibit (or provide exceptions to the prohibition of) resale and sharing of communications services and facilities. Resale is the subscription to communications services and facilities by one entity and the reoffering of communications services and facilities to the public (with or without "adding value") for profit. Sharing is a non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying the communications related costs associated therewith according to its pro rata usage of the communications services and facilities. The carriers have never been called upon to justify the prohibitions on resale and sharing as they exist now. It is clear, however, that the prohibitions restrict subscribers' use of their communications service, and the carriers must justify the restrictions as just and reasonable under Section 201(b) of the Communications Act, and the case law based thereon. Also, the restrictions and exceptions thereto are discriminatory, and thereby unlawful if it is determined that the discrimination is unjust and unreasonable under Section 202(a) of the Act. The burden of proof of establishing the justness and reasonableness of the restrictions and discrimination associated therewith is squarely on the carriers in whose tariffs the restrictions and exceptions are found.

5. Before determining the lawfulness of the tariffs, we find it helpful to look at the specific tariff provisions in issue. Although many carriers have restrictions on resale and sharing in their tariffs, we will refer to those of AT&T for our analysis. Except as noted, private line service (including DDS), MTS and WATS may not be resold by customers, due to the existence of provisions in various forms which state that the customer may not receive a payment for any use of the service, and may not transmit any communications for others. This prohibition does not apply to Other Common Carriers, who may obtain private line services from AT&T for resale to their customers. Although an MTS customer may permit a third party to use the service, it may not collect any charge from the third party in addition to the message charge set forth in the company's tariff. Moreover, AT&T generally requires that each private line customer must have a "communications requirement of his own" and a WATS customer must have a "direct interest" in the communications provided under that offering. There are exceptions to these restrictions, however. Private line service (except for Telpak) may be resold under certain circumstances by composite data service vendors (who are not considered to be "Other Common Carriers"); they may also resell WATS. Also, private line service is furnished to certain customers (identified in the tariff generally by their function, not by name) who may order the service for third party users having a specified relationship to the customer. Absent these provisions, referred to as the

"single customer exceptions," the customers would not be able to order service for the third parties because of the general prohibitions on resale and sharing. With respect to Telpak, AT&T allows Western Union to participate with it in offering such service while utilizing each other's facilities. No other carrier is afforded such treatment. AT&T does allow sharing of certain private line services (voice grade and under), subject to certain restrictions. Moreover, AT&T permits the "authorized users" of a customer to communicate with the customer, but not with each other, so long as all authorized users are in the same line of business. Sharing of WATS is not permitted.

6. We have examined the foregoing tariff provisions in light of the standards set forth in Sections 201(b) and 202(a) of the Act, and legal interpretations thereof, and find that existing restrictions on the sharing and resale of private line service are unjust and unreasonable and unlawfully discriminatory. Having made that determination, we view the impact on several service offerings. Telpak is a "bulk rate" tariff offering which provides a substantial economic incentive for sharing and resale, and it has characteristics distinct from other private line services. We therefore must separately consider the restrictions on sharing of Telpak and on resale of Telpak. Telpak was initially justified as a competitive response to private microwave systems, although we never held it to be the only proper response to such competition. Telpak has been made available, however, regardless of whether the customer would build its own microwave system if not allowed to take advantage of the Telpak rate discounts. Thus, Telpak has been offered on an indiscriminate basis to any customer (as AT&T defines that term) wishing to obtain the bulk discount, except customers which desire to resell or share the service. We find this discrimination to be unjust and unreasonable, and thus unlawful. Accordingly, the benefits available to Telpak customers now should be made available through resale to all customers, regardless of the size of their communications requirements. According to the policy we set forth herein, we also find no justification for limitations on Telpak sharing. We note in this regard that AT&T has from the beginning allowed certain smaller users to aggregate their needs to share the benefits of the lower Telpak rates, while denying others the same advantage for reasons not justified in this record. We have also given consideration to the economic impact and other aspects of unlimited resale and sharing of private line services to determine whether the broad restrictions which we find to be unlawful should be modified in a way which is appropriate to particular private line services. We find that there are no economic justifications for the partial retention of such restrictions, and we accordingly find unlimited resale and sharing of private line services (includingly those of the International Record Carriers) to be just and reasonable. However, the record does not support any change in the restrictions on MTS and WATS.

7. We find that elimination of the restrictions on unlimited resale and sharing of private line service will bring about public benefits which include:

(a) the provision of communications service at rates more closely related to costs;

(b) better management of communications networks, and the provision of management expertise by users and intermediaries to the carriers;

(c) the avoidance of waste of communications capacity; and,

(d) the creation of additional incentives for research and development of ancillary devices to be used with transmission lines.

8. We have also considered the extent to which we have jurisdiction over resale and sharing activities which exist and may reasonably be expected as a result of our decision. We find that an entity engaged in the resale of communications service is a common carrier, and is fully subject to the provisions of Title II of the Communications Act. We have considered and rejected arguments that (a) resellers are not engaged in common carriage under the Act and thus are not subject to our jurisdiction, and (b) we should exercise jurisdiction over resale entities only reasonably ancillary to our regulation of common carriers. Because sharing does not constitute the offering of a service by one entity to others for a profit, we find that entities engaged in sharing arrangements are not subject to regulation under Title II of the Act.

9. Finally, we have considered the manner in which resale carriers should be regulated under Title II of the Act, and what degree of supervision, if any, we should exercise over sharing arrangements. We find that with one exception, there is no reason to regulate a resale common carrier any differently than any other common carrier. The exception is that we find the public interest will be served by allowing open entry into the market for resale services, and thus we do not require a special showing of public need for the particular service being proposed as a condition of certification. Otherwise, we reject suggestions which would establish a "relaxed" regulation of the rates and practices of resale carriers, or which would provide for reporting requirements different from those now in our regulations. With respect to sharing, we will not at this time establish any regulations for sharing arrangements, be they through an intermediary or through joint use. Thus, we reject

suggestions that sharing should be limited according to the number of sharers or the amount of costs allocated to sharers in addition to the transmission costs. However, we do find inconsistent with non-profit sharing the allocation of a management fee to the sharers, unless the management is accomplished on a non-profit basis. We recognize that we may be called upon to resolve, on a case-by-case basis, issues as to whether sharing arrangements are in fact characterized by common carrier resale. It is our view at this time, however, that an absence of regulations and reporting requirements is preferable to the imposition of strict regulations (which still would probably not eliminate the need for case-by-case resolution of complaints). Although we do not adopt any regulations or reporting requirements at this time, we believe that we have jurisdiction over sharing arrangements to take whatever action may appear to be reasonably ancillary to our regulation of communications common carriers.

9a. It is crucial at the outset to understand exactly what our decision today does and does not do. AT&T presently allows entities to resell and share its facilities and services. This has been done voluntarily by AT&T since at least the 1920's. Probably the largest reseller of AT&T's facilities is Western Union. Pursuant to voluntarily entered-into agreements, Western Union can lease supergroups, intercity facilities and intracity facilities from AT&T.^{2a/} Further, AT&T voluntarily allows certain groups to purchase communications services and share the services among their members. Thus, AT&T has itself decided who should receive such status and who should not. What our decision does is simply to require AT&T to treat all of its customers alike unless valid reasons exist to the contrary. Such a requirement is mandated by the Communications Act.

^{2a/} See Bell System Tariff Offerings 46 FCC2d 413 (1974), aff'd sub nom. Bell Telephone Co. of Pa. v. F.C.C., 502 F.2d 1250 (3d Cir. 1974), cert. denied, AT&T v. F.C.C., 422 U.S. 1026 (1975).

BACKGROUND

A. Purpose of this Proceeding

10. This proceeding developed as a result of several factors. First, a number of entities have expressed an interest in providing an "augmented" or "value-added" communications service. As we stated in the Notice (Paragraph 3):

This interest has been spurred by the public's burgeoning demand for fast, efficient and low cost access to information in convenient format and the concomitant development of innovative communications technology to meet that demand.

Both the Specialized Common Carrier Inquiry and the Computer Inquiry 3/ manifested the existence of a substantially untapped, growing public need for non-voice communications. We stated in the Notice (paragraph 3) that the entities other than the established carriers which originate technological advancements may not be in a position to construct facilities, due to regulatory, procedural and economic limitations, and that:

Public enjoyment of state-of-the art communications technology and full utilization of existing capacity may thus require that independent enterprises devoted to marketing, retailing, brokerage and related functions be given a greater role in the communications industry.

We also observed that this would be a departure from the tradition in the communications industry where carriers owning and operating transmission facilities generally supply a complete communications service directly to the ultimate user.

3/ Docket No. 16979, Tentative Decision, 28 F.C.C. 2d 291 (1970), aff'd, Final Decision and Order, 28 F.C.C. 2d 267 (1971), aff'd in part and revs'd in part sub nom. GTE Service Corporation v. F.C.C., 474 F. 2d 724 (2d Cir. 1973).

9.

11. The interest expressed by entities in providing an "augmented" or "value-added" communications service extended to voice as well as non-voice communications. This interest had been recognized by the Commission in Docket No. 17457, the Telpak Sharing Case 4/. After the close of the record in that proceeding, the American Telephone and Telegraph Company (AT&T) instituted "single customer" features in its private line tariff 5/ for certain user groups having substantial need for a coordinated communications network connecting members of the group. In conferring single customer status upon a user group, AT&T allowed an intermediary entity to subscribe to sufficient private line service so as to enable the intermediary to provide the coordinated communications network desired by the user group. For example, the airlines were accorded single customer status by AT&T with Aeronautical Radio, Inc. (ARINC) as their intermediary 6/. We first recognized the airlines' need for a coordinated private line network and the appropriateness of ARINC's role as an intermediary between AT&T and the airlines in 1937. 7/ Moreover, in the Telpak Sharing Case we noted that the communications services supplied by ARINC, as an intermediary, were superior to the communications services supplied directly to the airlines under the Telpak sharing provisions:

Under the single customer concept in Telpak, ARINC as the customer, could order the appropriate Telpak configurations and circuitry and then assign circuits to the airlines as their needs required. This is the same role that ARINC could perform as the single licensee of a private microwave system. On the other hand the testimony was that shared Telpak is not comparable to either such single licensee private microwave or Telpak with a single customer feature, in terms of efficiency and flexibility. (Emphasis added.) 8/

4/ 23 F.C.C. 2d 606 (1970), aff'd in part and reversed in part sub nom. A.T.&T. v. F.C.C., 449 F. 2d 439 (2d Cir. 1971).

5/ AT&T Tariff F.C.C. No. 260, Section 2.2.1.

6/ AT&T Tariff F.C.C. No. 260, Section 2.2.1(G).

7/ Aeronautical Radio, Inc. v. A.T.&T., 4 F.C.C. 155 (1937).

8/ 23 F.C.C. 2d at 610.

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In creating the single customer provisions, AT&T in effect recognized the importance of an intermediary's role in providing a user group with a coordinated communications network. Subsequent requests to AT&T by other user groups seeking single customer status have suggested to the Commission that there is an increasing demand for voice communications services provided by an intermediary between the user group and the carriers owning and operating transmission facilities.

12. This proceeding was further precipitated by three pending matters all raising the same basic question (para. 1, supra) in one form or another: (a) a complaint filed by American Trucking Associations, Inc. (the Truckers) against AT&T for the latter's refusal to provide the Truckers with single customer status (Docket 19746) 9/; (b) a petition for rule-making (RM-1997) filed by Microwave Communications, Inc. (MCI) on June 13, 1972, which requested that we adopt procedures for monitoring private line-sharing arrangements to insure that line-sharing is on a cost-sharing, non-profit basis; and (c) a petition for rulemaking (RM-2218) filed by Western Union Telegraph Co. (Western Union) which requested a proceeding, analogous to the Specialized Common Carrier Inquiry, in which we would resolve certain public interest questions prior to granting Section 214 authorization to any further resale entities. In RM-2218, Western Union specifically urged the Commission to consider the public need for services provided in a resale manner and the competitive impact of resale on established carriers. These questions were presented by Western Union in the context of five issues (see Appendix A). Also leading to this proceeding was the fact that we had already certified three resale entities under Section 214 of the Act as common carriers. We stated in granting those applications that we would later resolve certain matters which we herein consider. See Packet Communications, Inc., 43 F.C.C. 2d 922 (1973); Graphnet Systems Inc., 44 F.C.C. 2d 800 (1974); Telenet Communications Corp., 46 F.C.C. 2d 680 (1974).

13. The basic question in this proceeding, set forth in paragraph 1, supra, can be divided into two separate and distinct questions. First, what constraints may carriers owning and operating transmission facilities lawfully impose upon the use which customers make of the service provided by these carriers? The answer to this question depends not only upon an analysis of legal precedents but also upon economic and policy considerations today in light of the growing demand for specialized, customized services and the technological developments in the communications field. Second, if particular service offerings should be made available for further resale and shared use, to what extent should the Commission regulate new resale operations and shared use arrangements? In the Notice (paragraph 26), we expressed the view that resale regulation issues were as significant as issues relating to the availability of facilities for resale or shared use purposes. We undertook to resolve

9/ American Trucking Ass'n., Inc. v. A.T.&T., 41 F.C.C. 2d 2 (1973).

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both the question of the availability of services for resale or shared use and the question of the Commission's regulatory approach in one broad rulemaking proceeding. As we stated in the Notice (paragraph 4):

The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved compels the conclusion that the fulfillment of our regulatory mandate requires that the questions that have been raised in the context of various discrete matters before us be considered in a broad rulemaking proceeding.

B. The Issues to be Resolved.

14. Having as our purpose the resolution of broad policy issues relating to the availability of communications services and facilities from established carriers, and also the Commission's regulatory approach to resale operations and sharing arrangements, we set forth twelve Items of Inquiry in the Notice (paragraph 31) to be considered in Docket 20097 (see Appendix B). Items of Inquiry 1 through 10 focused on the availability of communications services and facilities from established carriers, while Items of Inquiry 11 and 12 addressed the Commission's appropriate regulatory approach to resale operations and sharing arrangements. More specifically, Items of Inquiry 1 through 3 focused on the availability of private line services offered by Western Union and AT&T for resale. Briefly, interested parties were requested to comment on the following issues:

- (a) justification for current tariff restrictions on resale of private line services offered by AT&T and Western Union;
- (b) the effect upon (a) AT&T and Western Union (b) other segments of the communications industry and (c) communications users if all tariff provisions restricting private line resale of AT&T's and Western Union's offerings were to be eliminated; and
- (c) proposed alternatives to current tariff restrictions on private line resale of either carrier's offerings and the justifications for these proposed alternatives.

12.

Item of Inquiry 4 presented the above issues with respect to resale of other services offered by AT&T and Western Union and services offered by other common carriers. Items of Inquiry 5 through 8 focused on issues concerning shared use of communications services and facilities. Briefly, these Items of Inquiry requested interested parties to consider two broad issues:

- (a) the lawfulness under Sections 201 and 202 of the Communications Act of present tariff provisions dealing with shared use of communications services and facilities; and
- (b) a determination of the extent to which sharing arrangements would still be useful and desirable in the event that we allow more resale of communications services and facilities than is now permitted.

Items of Inquiry 9 and 10 invited interested parties to address the issues whether the single customer provisions contained in AT&T's and Western Union's private line tariffs were unlawfully discriminatory and, if so, what remedial measures should be taken to eliminate the discrimination. Finally, Items of Inquiry 11 and 12 solicited comments from interested parties on the second distinct question in Docket 20097, the Commission's proper regulatory approach to resale operations and sharing arrangements. Item of Inquiry 11 focused on the Commission's regulation of sharing arrangements, and Item of Inquiry 12 focused on the Commission's regulation of resale operations.

15. As we stated in paragraph 12, supra, Western Union urged that we consider five issues in RM-2218. Of these five issues, we stated in the Notice (paragraph 29) that three were implicitly within the scope of Docket 20097 and that their resolution was required prior to the establishment of general policies with regard to the resale of common carrier services and facilities. Briefly, Western Union requested that we consider whether the public interest would be served by allowing resellers to compete with specialized and general purpose carriers; whether resale-type services in competition with "essential primary services" offered by general purpose carriers would be in the public interest; and whether resale primarily of AT&T services will promote or restrict competition. With respect to the two remaining issues raised by Western Union, we stated that no resolution probably could be made in Docket 20097 in view of the diversity of existing and foreseeable resale services. Notice (paragraph 30). Nevertheless, we invited interested parties to comment on these issues.

16. Representative positions taken by the parties will be discussed in more detail as we consider the issues. At this point, we will briefly summarize the parties' principal positions. The telephone companies 10/ are generally opposed to removal of any resale and shared use restrictions except at their own discretion on an ad hoc basis. Moreover, they take the position that any resale should be subject to the full panoply of regulation under Title II of the Communications Act. The International Record Carriers 11/ also advocate continuance of present resale and shared use restrictions. Also, they advocate that resale and sharing both be regulated under Title II. Western Union and the specialized carriers are unopposed to "value-added" resale provided that such resale operations are subject to Title II. Western Union urges the Commission to apply the primary purpose test developed in the Computer Inquiry, supra, to non-computer processing operations such as businesses which arrange for the procurement and communication of permits, documents and money orders for the trucking industry. Under the primary purpose test, if we found these businesses to be primarily offering a communications service, Western Union would advocate Title II regulation. Western Union opposes any resale of "non-cost justified bulk discounts"; the specialized carriers merely oppose resale of Telpak by brokers, or "non-value-added" resellers. One certificated resale entity, Telenet Communications Corporation (Telenet), also advocates limiting resale to "value-added" services, but the other two certificated resale entities, Graphnet Systems, Inc. (Graphnet) and Packet Communications, Inc. (PCI), take no position on the Commission's entry control over resale. Telenet, Graphnet, and PCI all advocate loose Title II regulation. Telenet urges close regulation of shared use arrangements in order to insure that no covert resale operations take place. Telenet also favors resale and shared use of international record carrier services. The Office of Telecommunications Policy (OTP) is the principal advocate of unlimited resale and shared use. More specifically, OTP advocates complete availability of communications services and facilities for resale and shared use and, in addition, complete regulatory forbearance by the Commission over resale operations and shared use arrangements. OTP's position is supported by the Department of Justice (DOJ), several user groups and Tymshare, Inc. User groups such as the press interests 12/ generally advocate wider availability of communications services and facilities for resale and shared

10/ The telephone companies who submitted comments are AT&T, GTE Service Corporation (GTE), and United Systems Service, Inc. (USS).

11/ The International Record Carriers who submitted comments are RCA Global Communications, Inc. (RCA Globcom) and ITT World Communications, Inc. (ITT Worldcom).

12/ The press interests include the American Newspaper Publishers Association (ANPA), The Associated Press (AP), Commodity News Services, Inc. (CNS), United Press International, Inc. (UPI), and Dow Jones.

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use. With respect to the single customer provisions in AT&T's and Western Union's private line tariffs, there are three basic positions taken by the parties. The telephone companies and the user groups which have been granted single customer status by AT&T argue that these provisions are not unlawfully discriminatory. Other user groups such as the Truckers argue that these provisions are unlawfully discriminatory and that the appropriate remedy is selective expansion of single customer status to certain other user groups. Finally, Datran and Telenet contend that the single customer provisions are unlawfully discriminatory, but that the remedy is elimination of these provisions rather than selective expansion.

C. Definition and Description of Resale and Sharing

17. Before we proceed with consideration of the foregoing issues, it is helpful to define "resale" and "sharing" as they are used herein, and to briefly describe resale and sharing activities. We define resale to be an activity wherein one entity subscribes to the communications services and facilities of another entity and then re-offers communications service and facilities to the public (with or without "adding value") for profit. Carriers owning transmission facilities from whom resale entities obtain communications service shall be referred to as underlying carriers. ^{13/} Foremost among the underlying carriers are the telephone companies, simply because of the size of their collective communications plant. Some underlying carriers, most notably Western Union, also make "resale" offerings of communications services consisting of facilities which they lease from underlying carriers.

18. Although some parties submitting comments in Docket No. 20097 recognize that some public benefits may result from a policy allowing the resale of communications services, they nevertheless oppose such a policy on the grounds that it will have a significant adverse economic impact on the communications industry and the public. If resale is to be permitted, these parties argue, the Commission should permit resale only when the reseller "adds value" to the existing service. ^{14/}

^{13/} The underlying carrier may supply the basic communications service via facilities which it owns or a mixture of owned and leased facilities.

^{14/} The three certificated resale carriers all proposed service which "added value" to the basic communications service obtained from the underlying carriers. PCI, for example, proposed to lease wideband interexchange lines from the underlying carriers to be utilized in the offering of nationwide computer-switched communications networks

(Footnote continued on next page.)

15.

We do not believe that there is an objective, usable standard to distinguish "value-added" from "non-value-added" services. Clearly, there are some forms of resale which are "value added", 15/ but we believe that the term "value-added" has limited descriptive utility and, for reasons stated subsequently in this Report and Order, we have attached no regulatory significance to the term. Nevertheless we will continue at times to use the term because, as we have noted, some forms of resale have traditionally been referred to as "value-added."

19. Rather than divide resale into "value-added" and "non-value-added," we believe that resale activity can be categorized into two reasonably distinct forms-- brokerage and processing. Both broker and processor deal directly with the underlying carrier 16/, but then utilize the communications services to which they have subscribed in different manners. The broker never physically controls the utilization of a communications facility or service provided by the underlying carrier. The broker merely acts as an intermediary between the underlying carrier and an end user, who ultimately controls the utilization of

14/ Footnote continued.

for the transmission of non-voice information. Graphnet planned to obtain communications facilities from other common carriers, including message toll service (MTS), to establish a nationwide computerized packet switched store-and-forward facsimile communications system. Telenet planned to establish central office facilities containing Interface Message Processors (IMPs) or Terminal Interface Processors or Satellite IMPs to which customer computers and terminals could be connected by means of high speed transmission facilities which Telenet would lease from underlying carriers.

15/ But this status is not static. We consider Graphnet and Telenet to be presently offering "value-added" resale services, but if the underlying carrier decides to supplement its basic service with technologies similar to Graphnet and Telenet, the latter resale services would lose their "value-added" character. Thus, if we conditioned entry on a "value added" showing, the underlying carriers would be in a position to eliminate competition simply by their decision to offer a particular service.

16/ However, there may be instances where the processor deals only with the broker, or vice-versa.

16.

the communications facility or service subscribed to by the broker. The broker thus functions exclusively as a middleman, uniting the underlying carrier and the end user through an intermediary under terms of price and delivery which presumably will be sufficiently favorable to the end user to warrant payment of a brokerage fee. Thus, the end user is the broker's customer, just as the broker is the customer of the underlying carrier. Clearly, an important environment in which brokerage activity would thrive is one where underlying carriers make available bulk discounted services such as AT&T's Telpak offering. The broker could aggregate the demands of end users with communication needs insufficient to justify subscription to Telpak, subscribe to Telpak, and resell to the end users at rates below private line rates but above the Telpak rates. Another environment in which brokerage might thrive is where the underlying carrier offers a private line service, but conditions that offering on subscription to that service for a minimum time period. In fact, most carriers place such a precondition on subscription to any private line service. Brokers might profitably resell such private line offerings to a group of end users, each with a communications requirement for the private line service but a requirement for less than the minimum time period at which the underlying carrier makes the offering. 17/

20. Unlike the broker, the resaleprocessor retains continuous control over the utilization of services and facilities furnished by the underlying carriers. The fundamental offering of the communications carrier is supplemented by other facilities or services, and the resulting package, which includes a resold communications service, is offered to the public. One such supplemental facility is the computer. In the Computer Inquiry, supra note 3, we defined the various supplemental services that computers in combination with private lines could provide to the using public. We based our jurisdictional position on these supplemental services offered via computers on the type of supplemental service that was provided by the computer. If the computer merely controlled the transmission of messages between two or more points, leaving the message content "unaltered", we denoted this supplemental service as "message switching." 18/ Moreover, we concluded that message-switching in combination with private lines was a communications common carrier service subject to Title II of the Communications Act. 19/ On the other hand, we realized that computers can do more than control the

17/ Brokerage activity exemplifies another problem which we have with the term "value-added." Clearly, within certain environments created by the underlying carriers, brokers will find markets for their services. Thus, one can argue that if any end user is willing to purchase service from the broker, the broker has "added-value" to the underlying carrier's communication services.

18/ 47 C.F.R. 64.702(2).

19/ Final Decision and Order, 28 F.C.C. 2d at 278.

transmission of messages between two or more points. Therefore, we defined a supplemental service, "data processing," and gave some illustrative examples of message content alteration which would constitute data processing. Specifically, we stated that data processing is the use of a computer for processing of information and processing involves use of the computer for operations which include "storing, retrieving, sorting, and calculating data, according to programmed instructions." 20/ We then defined a supplemental service, "Remote Access Data Processing Service," as a data processing offering:

wherein communications facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals. 21/

We expressly declined to assert our jurisdiction over the offering of a data processing service. 22/ We also recognized that a supplemental service could combine computers with private lines in order to provide both message-switching and data-processing. When such a supplemental service was offered, we decided to assert Title II jurisdiction if the data processing service was merely incidental to the message switching, and declined to assert any jurisdiction if the message switching service was merely incidental to the data processing service. 23/ The former supplemental service was denoted as a hybrid communications service 24/ while the latter was denoted as a hybrid data processing service. 25/ In summary, we saw the computer resale operator as offering any of four supplemental services in conjunction with leased private lines:

- a. Message switching (subject to Title II)
- b. Hybrid communications (subject to Title II)
- c. Hybrid data processing (not subject to Title II)
- d. Remote access data processing (not subject to Title II)

20/ 47 C.F.R. 64.702(a)(1).

21/ 47 C.F.R. 64.702(a)(4).

22/ Tentative Decision, 28 F.C.C. 2d at 298, aff'd, Final Decision and Order, 28 F.C.C. 2d at 278.

23/ Tentative Decision, 28 F.C.C. 2d at 305, aff'd, Final Decision and Order, 28 F.C.C. 2d at 278.

24/ 47 C.F.R. §702.5(1).

25/ 47 C.F.R. §702.5(11).

21. Beyond the supplemental services which can be offered by the combination of computers with private lines is a family of applications based upon the resale of lower bandwidth (or lower data speed) circuits which the processor has derived, by the use of multiplexer equipment, from higher bandwidth (or higher data speed) circuits which have been leased from an underlying carrier. ^{26/} This type of resale operation could only thrive in an environment where the underlying carrier's private line rate levels are internally inconsistent so that the cost to the reseller of providing the derived sub-channels would be somewhat less than the tariffed rates of the underlying carrier for providing discrete channels of the same bandwidth. Other resale operations involving technological supplemental services include packet switching ^{27/} and facsimile communications. Facsimile communications networks, utilizing telecopiers and MTS, involve network organizers who provide agents with directories containing the location and telephone number of all other outlets. The agent makes a public offering to send communications in facsimile form to any other network location and charges each customer a fee in addition to the MTS charge. The fee is split between agent and organizer. Finally, we made reference in the Notice (paragraph 11) to a number of services providing a mixture of communications and non-computer processing, such as services which arrange for the procurement and communication of permits, documents and money orders for the trucking industry.

22. The resale processor differs from the broker not only because it physically controls the underlying carrier's services and facilities, but also because it may incur substantial costs to engage in operation. To offer a multiplex type of resale operation, the processor would have to incur costs (in addition to those related to the leasing of the underlying carrier's lines) for multiplex equipment, office space, marketing, and maintenance. In addition to the costs resulting from the leasing of transmission plant, message and packet switching operators must also incur, *inter alia*, lease or purchase costs for computer hardware, start-up costs for software development and network engineering, and recurring costs and expenses due to maintenance, marketing, and general and administrative expenses. The operators of hybrid communications or processing services basically incur the same costs as do the

^{26/} Because in many instances the underlying carrier will offer channels of the same bandwidth as the derived channels, the multiplexing operation is clearly not value-added. But this does not invalidate our basic position that it would be exceedingly difficult, if not impossible, to draw a line between "value-added" and "non-value-added" resale.

^{27/} PCI and Graphnet are examples (see note 14, *supra*).

message switching and packet switching operators. The remote access data processor also encounters similar costs.

23. As we define the term here, "sharing" is a non-profit arrangement in which several users, perhaps having no community of interest other than to communicate between the same two geographic points or to communicate with each other, collectively use communications services and facilities obtained from an underlying carrier or a resale carrier, with each user paying the communications-related costs associated with subscription to and collective use of the communications services and facilities according to its pro rata usage of such communications services and facilities. As we pointed out in the Notice (paragraph 9), sharing arrangements in respect to private line services can vary from the simple cooperative use of one channel between two points on an alternate time basis, to the provision of discrete sub-channels derived from a voice grade channel, 28/ up to complex networks which the sharing participants may access at a number of points and which may be conditioned for the carriage of communications of a specialized nature. Generally, there are no technological barriers to sharing point-to-point private line channels (telegraph speed, voice grade, or wideband; analog or digital).

24. As we also stated in the Notice (paragraph 19), the principal advantage of non-profit sharing arrangements is economic--both the subscriber and its designated sharers enjoy communications capacity at a lower cost than if each were being supplied separately by the carrier. For example, AT&T's private line services are generally available in discrete quantities of bandwidth and on a full time basis. A subscriber may not have a communications need for the full amount of bandwidth supplied by the underlying carrier and may not have a need to utilize the private line service on a full-time basis. Therein lie two economic incentives for the subscriber to find other users who also require private line service between the same two points as does the subscriber. A private line sharing arrangement will allow each subscriber to reduce its costs of subscribing to private line service.

25. Realistically, the type of sharing arrangement denoted as "joint use" by AT&T's private line tariff 29/ may prove to be impractical because of the administrative burdens thrust upon the subscriber. It must first find other users with similar communications needs, and then act as coordinator of the sharing arrangement. Finally, if its own

28/ Even wideband channels may be subdivided into channels of lesser bandwidth such as voice grade channels. Technically, an analog channel can be subdivided by a frequency division multiplexer and a digital channel can be subdivided by a time division multiplexer into a number of digital channels of lesser data rate.

29/ AT&T Tariff F.C.C. No. 260, Section 3.1.5.

communications needs change--that is, if it either needs the private line for longer periods or needs to utilize a greater portion of the channel bandwidth--its needs may come into conflict with the needs of the other sharing participants, thereby possibly ending the sharing arrangement. We reasonably expect that sharing through an intermediary entity may in some circumstances eliminate these problems. For example, a user group having a substantial need to communicate among members may form an intermediary entity which is collectively owned by some or all members of the user group. The intermediary would subscribe to carriers' services, and in turn furnish these services to the user group so that they may satisfy their needs to communicate among members. As a result, the intermediary might have no communications requirement of its own for the services to which it subscribes. This form of sharing presently accomodates the needs of a select few user groups such as the airlines, the electric utilities and the stock exchanges. 30/

26. It is important to recognize here, as we discuss in paragraphs 120-129, infra, that there is a potential for profit in any sharing arrangement. Under Section 3.1.5 of AT&T Tariff F.C.C. No. 260, joint users are billed directly by AT&T for line costs based on their pro rata usage of the private line. The subscriber (denoted as a "customer" in AT&T's private line tariff) also is charged for a portion of the line costs corresponding to its pro rata usage of the line, presumably including an element for unused line capacity. AT&T permits the customer to determine the pro rata usage of the customer and joint users. As Telenet notes, this represents the first opportunity for a customer to derive a profit from a joint use arrangement. Also, in the typical joint use arrangement the subscriber may charge each joint user for any administrative expenses which the subscriber may incur in managing the joint use arrangement. While this so-called "management fee" purports to reimburse the subscriber for its administrative expenses, there is an inherent potential for some subscribers to include an element of profit in the management fee. And when the subscriber adds to the private line certain ancillary equipment, software, or other enhancing features, there are additional inherent potentials for profit by the subscriber. If the subscriber owns the ancillary equipment it can charge each joint user a monthly rental fee, which includes an element for monthly maintenance of the equipment and an element representing the monthly depreciation rates on the equipment. Both elements provide the subscriber with the potential for including an element of profit in its rental fee.

30/ Sharing through an intermediary entity is presently allowed only if AT&T or Western Union accords the user group "single customer" status. See AT&T Tariff F.C.C. No. 260, Section 2.2.1; Western Union Tariff F.C.C. No. 254, Section 2.2.1. The single customer provisions will be more fully discussed in Appendix E.

LAWFULNESS OF TARIFF PROVISIONSA. Tariff Descriptions

27. Before we look to the legal principles applicable to restrictions on resale and sharing, it is appropriate to describe the specific tariff provisions in question. These tariff provisions restricting resale and sharing of common carrier services and facilities are found in virtually all tariffs filed by underlying carriers, although there is some variation in the degree to which individual carriers restrict resale and sharing of their communications services and facilities. The AT&T tariffs govern the offering of all Bell companies and are concurred in by GTE telephone companies. Although subsequent discussion will primarily focus on AT&T's tariff restrictions, we will reach conclusions of law applicable to tariff restrictions imposed by all underlying carriers. Because AT&T is the principal supplier of communications services and facilities, its tariff language is often adopted by other underlying carriers. For this reason, we believe that reference to AT&T's tariffs will prove adequate for an analysis of the lawfulness of all carrier tariffs restricting resale and sharing.

28. With certain exceptions, AT&T's interstate tariffs forbid its customers from reselling communications services and sending third party traffic. As stated in Section 2.2.3 of AT&T Tariff F.C.C. No. 260:

Private line service shall not be used for any purpose for which a payment or other compensation shall be received by. . .the customer. . . or in the collection, transmission or delivery of any communications for others.

Similar language is found in Section 2.2.5 of AT&T Tariff F.C.C. No. 267, governing DDS offerings. General resale prohibitions are also found in the tariffs for MTS and WATS, which constitute the basic message switched services offered by AT&T over the national telephone network. At Section 2.2.1 of AT&T Tariff F.C.C. No. 259, governing the WATS offering, it is stated that:

. . .service. . . shall not be used for any purpose for which a payment or other compensation shall be received. . .for such use, or in the collection, transmission or delivery of any communications for others.

Finally, while third party traffic on MTS is permitted, the customer may not derive a profit therefrom:

The service is provided for use by the customer and may be used by others, when so authorized, by the customer, providing that such use shall not be made subject to any charge by the customer in addition to the message charges of the Telephone Company as set forth in this tariff. 31/

Because these tariff provisions are couched in terms such as "payment" and "compensation" rather than "profit," they may be viewed as general prohibitions on all intermediary activity involving AT&T communications services and facilities with the exception of MTS. This, in effect, is how AT&T construes the above tariff provisions. In the course of this proceeding, AT&T defined resale, by reference to paragraph 15 of the Notice, as the provision of communications services and facilities to an intermediary who then reoffers the services and facilities to the public, irrespective of whether the offering is made at cost or at cost plus profit. (See AT&T's Comments at 4-5.) Thus, AT&T's tariffs with certain exceptions prohibit all intermediary activity, whether it be resale or an intermediary sharing arrangement.

29. In addition to the specific prohibitions on intermediary activity, other tariff provisions effectively prevent resale and intermediary sharing arrangements. For instance, in order to obtain communication service from AT&T, a potential user must have "a communications requirement of his own for /the/ use" of private line services 32/. WATS is provided only for communications in which the customer has a "direct interest" 33/. The term "communications requirement" is nowhere

31/ AT&T Tariff F.C.C. No. 263, Section 2.2.1.

32/ AT&T Tariff F.C.C. No. 260, Section 2.5; AT&T Tariff F.C.C. No. 267, Section 2.2.5(a).

33/ AT&T Tariff F.C.C. No. 259, Section 2.2.1.

defined in either AT&T's private line or DDS tariffs. But the general prohibition against intermediary activity allows one to conclude that, with few exceptions (contained in the so-called single customer provisions subsequently described), the term does not mean a requirement to transmit messages for others who have the only interest in the content of the message being transmitted. With respect to WATS, the Commission has interpreted the "direct interest" prerequisite to WATS customer status to mean that "each WATS customer must have an interest in the content of each of the communications made over the WATS line and not merely in the amount of the charges therefor." Associated Students of the University of Arizona (ASUA) v. American Telephone & Telegraph Co., 43 F.C.C. 2d 197, 198 (1973) (emphasis in original). Thus, even without express prohibitions on intermediary activity within AT&T's private line and WATS tariffs, intermediaries would still be unable to subscribe to these services since they would lack the necessary "communications requirement" for private line service and the "direct interest" prerequisite to status as a WATS customer.

30. The existing restrictions on resale and sharing generally do not apply to Other Common Carriers (OCCs), which are defined in AT&T Tariff F.C.C. No. 266, Section 2.6 as "Specialized Common Carriers, Domestic and International Record Carriers and Domestic Satellite Carriers engaged in providing such private line voice, data or video service as such carrier may be authorized by the Federal Communications Commission to provide." As part of the settlement in Docket No. 20099, AT&T agreed to file tariffs offering OCCs: (a) voice grade facilities, (b) voice grade data facilities, (c) audio facilities, (d) 50 kbps data facilities, (e) 50 kbps data alternate voice grade facilities, (f) wire pair facilities, (g) medium speed digital facilities, (h) voice grade connecting facilities, (i) voice grade data connecting facilities, (j) video facilities, (k) reserved complements, and (m) telegraph grade facilities within the international gateway cities. See A.T.&T., 52 F.C.C. 2d 727(1975). Although the private line service is provided under a tariff other than Tariffs 260 and 267, the OCCs have the option of obtaining from AT&T various types of intercity facilities (including FX and CCSA) to remote areas, rather than constructing these facilities themselves. We stated in accepting the settlement agreement that before we granted an OCC a Section 214 authorization to construct facilities, we will consider whether it is in the public interest for the OCC to acquire such facilities from AT&T instead. We do not expect that our action in this proceeding will abrogate the settlement reached in Docket No. 20099.

31. However, there are exceptions to the resale and sharing prohibitions contained in AT&T's tariffs. These include the so-called single customer provisions which are contained in AT&T Tariff F.C.C. No. 260 34/, and which will subsequently be discussed at greater length. For now, we merely observe that these provisions allow both resale and intermediary sharing arrangements. Some single customer provisions permit certain entities, which otherwise would not qualify as customers, to order private line service for third party users having a specified relationship to the single customer entities. For example, organized stock or commodity exchanges may order service:

for the transmission of communications to or from an exchange member located on the floor of such exchange and relating directly to the business of the member. 35/

Other single customer provisions expressly permit resale of private line service by the so-called composite data service vendors (CDSV's) and the United States Postal Service. 36/ The latter can only resell private line service in the provision of Facsimile Mail Service. CDSV's are defined as entities which have been certificated under Section 214 by the Commission to perform data switching for others. 37/ Under AT&T Tariff F.C.C. No. 260, CDSVs can resell any private line service except Series 5000 (Telpak) 38/. CDSVs are also allowed to resell all private line DDS offerings 39/ and all WATS offerings 40/. However, CDSV resale under AT&T Tariff F.C.C. No. 260 is constrained by the requirement that communications be "to or from the customers" (i.e., the CDSV) 41/. There are other limited exceptions to the prohibition on resale on WATS 42/.

32. Finally, AT&T allows limited sharing of its private line services. As we observed in the Notice (paragraph 8) AT&T generally permits joint use under AT&T Tariff F.C.C. No. 260 for Series 1000, 2000

34/ AT&T Tariff F.C.C. No. 260, Sections 2.2.1(C)-(J).

35/ Id. at Section 2.2.1(E).

36/ Id. at Sections 2.2.1(H) and (J).

37/ Id. at Section 2.5.

38/ Id. at Section 3.2.5(A).

39/ AT&T Tariff F.C.C. No. 267, Section 2.2.5(A).

40/ AT&T Tariff F.C.C. No. 259, Section 2.2.1(C).

41/ AT&T Tariff F.C.C. No. 260, Sections 2.2.1(A), (J). There appears to be no similar restrictions on CDSVs under the DDS tariff.

42/ AT&T Tariff F.C.C. No. 259, Section 2.2.1 (A) and B).

3000 and 4000 services 43/. In order to establish a joint use arrangement, a customer designates persons, firms or corporations to be joint users of the customer's private line service 44/ and requests that a carrier arrange its private line service for joint use. 45/ The customer is also the only party from whom the carrier will accept orders involving rearrangement, release or discontinuance of service 46/. Intercity channel charges are allocated among the customer and joint users on the basis of percentage use of the private line service as determined by the customer, not the carrier 47/. Certain additional monthly charges are assessed for each private line service arranged for joint use 48/. Each joint user as well as the customer is billed directly by the carrier. 49/ FX service and service furnished in connection with CCSA may not be jointly used. 50/ Series 6000 through 8000 services may not be jointly used, and only one derived voice grade channel under Telpak may be jointly used. 51/ Additionally, CDSVs may not simultaneously provide message-switching services and engage in joint use arrangements over the same private line service. 52/ The DDS tariff permits line sharing of all DDS private line services 53/. Unlike joint use arrangements under Tariff F.C.C. No. 260, only the customer is directly billed by the carrier. 54/ Again, CDSVs may not simultaneously provide message switching service and line sharing over the same DDS private line service. 55/

33. Another form of sharing permitted by AT&T is the authorized use arrangement. Whereas joint use generally benefits

43/ AT&T Tariff F.C.C. No. 260, Section 3.1.5(A).

44/ Id. at Section 2.5.

45/ Id. at Section 3.1.5(A)(3).

46/ Id.

47/ Id. at Section 3.1.5(A)(5).

48/ Id.

49/ Id. at Section 3.1.5(A)(4).

50/ Id. at Section 3.1.5(A)(1)(a), (b).

51/ Id. at Section 3.1.5(A)(1).

52/ Id. at Section 3.1.5(A)(1)(C).

53/ AT&T Tariff F.C.C. No. 267, Section 2.2. 5(B).

54/ Id. at Section 2.2.5(B)(4).

55/ Id. at Section 2.2.5(B)(2).

persons or entities having a need to communicate between the same two points, authorized use benefits persons or entities geographically separated and with a need to communicate with each other. For example, AP engages in this form of sharing because of its need to receive from and disseminate news to its regional members. As set forth in AT&T Tariff F.C.C. No. 260, private line service may be used:

[for] the transmission, to all stations simultaneously, of communications which relate directly to matters of common interest to the customer and the authorized users when those connected to the service are all in the same general line of business. 56/

However, all communications must be "to or from the customer" 57/ An "authorized user" is simply defined as a person, firm, or corporation "authorized" by a customer or joint user to be connected to its service. 58/ Thus, subscribers, each with an office in city A and each in need of communication with another person, firm or corporation in city B, can jointly use voice grade and under private line service to communicate with their respective authorized users. 59/ To this extent, joint use and authorized use arrangements overlap.

56/ Id. at Section 2.2.5(B)

57/ Id. at Section 2.2.1(A). Although Section 2.2.1(B) does not expressly reference Section 2.2.1(A), AT&T acknowledges that the former section governing authorized use is subject to the "to and from the customer" requirement in Section 2.2.1(A). See AT&T's Reply Comments at 9.

58/ Id. at Section 2.5.

59/ The customer designates the joint users who need not be in the same general line of business as the customer. However, the joint users then may choose as authorized users only those entities in the same general line of business. Finally, the customer and joint users are directly billed by the carrier. See Section 3.1.5(A)(5). But the carrier maintains no direct relationship with authorized users.

B. Applicable Legal Standards

34. As we stated in the Notice (paragraph 16), one of the principal issues to be resolved in this proceeding is whether tariff provisions restricting resale and shared use of common carrier services and facilities are just and reasonable under Section 201(b) and not unjustly or unreasonably discriminatory under Section 202(a). Section 201(b) provides that:

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful. . .

Section 202(a) makes it unlawful:

for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service. . .

Section 202(a) focuses on the justness and reasonableness of relationships between different charges, practices, classifications and regulations for or in connection with like communication service, whereas the focus of Section 201(b) is on the justness and reasonableness of specific charges, practices, classifications or regulations.

35. Because tariff provisions restricting resale or sharing of communications services and facilities are specific restrictions imposed on the subscriber's use of these services and facilities, these tariff provisions are practices, classifications and regulations subject to Section 201(b). As heretofore noted, Section 201(b) declares unjust or unreasonable practices, classifications and regulations to be unlawful. Thus, we must examine the carrier tariff restrictions on resale and sharing with the objective being to decide if these restrictions are unjust or unreasonable, and thus unlawful. In the past, questions have arisen as to the lawfulness of other types of tariff use restrictions under Section 201(b), and a principle has developed governing the extent to which carriers can restrict a subscriber's ability to attach non-carrier owned (foreign) devices to the carriers' communications networks. Hush-A-Phone Corporation v. United States, 238 F. 2d 266 (D.C. Cir. 1956); Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C. 2d 420 (1968) (hereinafter the Carterfone decision); Referral of Chastain v. American Telephone and Telegraph Co., 49 F.C.C. 2d 749 (1974). As the court held in Hush-A-Phone, *supra*, a carrier may not restrict a subscriber's right to use the carrier's services and facilities in ways which are privately beneficial without being publicly detrimental. 238 F. 2d at 269. Subsequent discussion will show that we expect a large segment of the using public to privately benefit from greater availability of common carrier services and facilities for resale and sharing (see paras. 75 - 88, *infra*). Under the principle set forth by the court in Hush-A-Phone, and subsequently followed by the Commission in Carterfone and Referral of Chastain, the lawfulness of tariff provisions restricting resale and sharing of a particular service turns on whether unlimited resale and sharing of that service will be publicly detrimental.

36. Tariff provisions restricting resale and sharing are also patently discriminatory, and therefore must be considered in light of the prohibitions contained in Section 202(a) of the Act. For example, tariff prohibitions on intermediary activities effectively foreclose a certain class of potential subscribers from obtaining carrier services and facilities--specifically, those persons or entities acting as intermediaries between underlying carriers and the using public.^{60/} Hence,

^{60/} Other tariff restrictions which merely limit the type of resale or sharing are also patently discriminatory in that these restrictions foreclose service to persons or entities seeking to engage in other types of resale and sharing.

these prohibitions constitute discriminatory practices, classifications and regulations. However, Section 202(a) does not prohibit all discrimination; it merely prohibits discrimination which is unjust and unreasonable. Because the Communications Act was modeled after the Interstate Commerce Act, 49 U.S.C. §81 et seq. (1970), we think it appropriate to refer to precedents under the latter act in our assessment of the justness and reasonableness of carrier discrimination against intermediary entities.

37. We believe that judicial construction of the obligations owed by railroads to freight forwarders relates closely to questions now before this Commission. From almost the time of its inception, the I.C.C. authorized railroad shipping rates for carload lots which were below the rates for less than-carload lots. As a natural outgrowth of this dual rate structure, freight forwarders appeared; the freight forwarder would collect less-than-carload lots, consolidate them into carload lots, and ship the consolidated carload lot by railroad. Serving as both consignor and consignee of the shipment, the freight forwarder paid the tariffed carload rates to the railroad and charged customers at rates between the tariffed carload and less-than-carload rates. Thus, the freight forwarder profited while the small-volume shippers realized savings in transportation costs. Because freight forwarding activities adversely affected railroad's revenues, railroads ultimately restricted their reduced carload rates to only those shippers actually owning carload quantities of merchandise which they shipped. The forwarders were relegated to shipping goods at less-than-carload rates. The I.C.C. found the new tariffs to be unjustly and unreasonably discriminatory under Section 2 of the Interstate Commerce Act, 49 U.S.C. §2; the model, along with Section 3(1), 49 U.S.C. §3(1), of Section 202(a) of the Communications Act. In affirming the I.C.C.'s finding of unlawful discrimination, the Supreme Court rejected the contention that a railroad could engage in discriminatory treatment based upon the shipper's identity:

The contention that a railroad when goods are tendered to it for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inherent in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a railroad, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. 61/

61/ I.C.C. v. Delaware, L. & W.R.R. Co., 220 U.S. 235, 252 (1911).

The Court also rejected the contention that competition between the freight forwarder and the railroad justified the latter's discrimination against the former. Subsequent decisions have reaffirmed the proposition that a railroad may not discriminate for or against a shipper merely because the shipper competes with the railroad. American Trucking Associations, Inc. v. Atchison, T.&S.F. Ry. Co., 387 U.S. 397 (1967); I.C.C. v. Baltimore & O.R. Co., 225 U.S. 326 (1912). In Atchison, T.&S.F. Ry. Co., the Court stated that the Interstate Commerce Act, its history, and the large body of decisions construing the Act gave rise to a presumption that the carrier must provide service to all shippers, including competitors, on equal terms. The Court further observed (387 U.S. at 407):

It is, of course, of no consequence that the Act does not expressly command that the railroads furnish this service to motor carriers. Their obligation as common carriers is comprehensive and exceptions are not to be implied.

See also United States v. Pennsylvania R. Co., 323 U.S. 612 (1954).

C. Application of Legal Principles

38. We now evaluate the lawfulness of the tariff provisions in view of the legal standards of Section 201(b) and 202(a) of the Act, and the carriers' justifications for the restrictions on resale and sharing. As we stated in the Notice (paragraph 16), the communications common carriers have never been called upon, either formally or informally, to justify their tariff restrictions on resale and shared use of communications services and facilities. AT&T and GTE note in their comments that state regulatory commissions and state courts have previously upheld tariff restrictions on resale. Citing decisions involving resale of telephone service and submetering of electricity service, AT&T argues that resale restrictions are justified because resale would destroy the telephone company's rate structure, threaten the traditional concept of regulation and interject a middleman into the provision of telecommunications services in contravention of public policy (AT&T's Comments at 2-3). Citing similar decisions, GTE states that resale restrictions are justified because resale would constitute a diversion of utility revenues, create unjustifiable discrimination among service users, and permit an unregulated middleman to compete with regulated entities (GTE Comments at 14). Thus, AT&T and GTE seek Commission approval of the lawfulness of existing tariff restrictions because their removal could: (a) adversely impact carrier revenues or rate structures; (b) in some manner have discriminatory results; (c) interpose a middleman between carriers owning and operating transmission facilities and the using public; and (d) lead to competition between regulated and unregulated entities in the provision of communications services.

39. We do not view the interposition of a middleman between an underlying carrier and the using public as contravening any express or implicit policy in the Communications Act. On three previous occasions, we have sanctioned a division of responsibility in the provision of communication services to the using public. Carterfone, supra; Bell System Tariff Offerings, 46 F.C.C. 2d 413 (1974), aff'd sub nom. Bell Telephone Co. of Pennsylvania v. F.C.C., 503 F. 2d 1250 (3d Cir. 1974); cert. denied, 422 U.S. 1026 (1975); Aeronautical Radio, Inc. v. AT&T, 4 F.C.C. 155 (1937). Additionally, AT&T's own single customer provisions (see Appendix E) can be viewed as implicit agreement with the proposition that a division of responsibility is appropriate in some circumstances. Thus, we reject the argument that the imposition of a middleman between the carrier and the ultimate user is justification for the restrictions on resale and sharing. Because we have decided that regulation of resale under Title II of the Act is required (see paragraphs 102-119), there should be no element of unfairness in the competition between resellers and underlying carriers, because both will be regulated entities. Contrary to GTE's assertion that widespread resale of underlying carriers' services and facilities will have discriminatory results, we are reasonably certain that widespread resale will have the opposite effect. The allegation that discrimination will result from elimination of the restrictions is not supported by this record.

40. Finally, we do not view tariff restrictions on resale as justified merely because they protect carrier revenues or rate structures. We note that in Carterfone, supra, a tariff prohibition against attachment of the Carterfone device was declared unlawful under Section 201(b) even though AT&T marketed a similar device and therefore would suffer revenue losses should this tariff prohibition be eliminated. Therefore, we believe that the only revenue losses of consequence in assessing the lawfulness of tariff restrictions on resale and sharing are those which ultimately burden subscribers to the carrier's services and facilities. And because we expect many of these subscribers to benefit from liberalized resale and sharing, we must, in determining whether the restrictions are just and reasonable under Section 201(b), weigh any adverse impact on the using public against countervailing benefits to those segments of the using public which engage in resale and sharing. Those benefits are fully discussed at paragraphs 75 to 88, infra. When these benefits are weighed against any possible adverse consequences of our decision herein, we conclude that the restrictions on the subscriber's resale and sharing of communications service are unjust and unreasonable under Section 201(b) of the Act. 62/ We find that unlimited resale and sharing are just and reasonable, and so prescribe.

62/ There is no evidence in this record that allowing resale will lower carrier revenues to the point that it will impact on service to the public. In fact, we find that unlimited resale might stimulate the market for private line services as resellers obtain service from the underlying carriers to provide new offerings to the public.

32.

41. We turn now to the lawfulness of the tariff restrictions and exceptions thereto under Sections 202(a) of the Act. In this regard, precedent of the I.C.C. is helpful.

We are not constrained to courses of action which have been dictated by the requirements of the transportation industry. General Telephone Co. of Southwest v. United States, 449 F. 2d 846 (5th Cir. 1971). However, we believe that decisions construing Section 2 of the Interstate Commerce Act (see paragraph 37, supra) provide us with certain principles relevant to an assessment of the justness and reasonableness of communications common carrier discrimination against intermediaries. In particular, we do not believe that carriers can deny service to resale entities merely because the latter offer competition to the carriers. Thus, we do not view revenue losses or rate structure changes which may result from such competition as automatically justifying a denial of service to intermediary

entities. 63/ Nor do we believe that carriers may deny service to prospective resellers merely because they lack a "communications requirement of their own for . . . use" of private line service. The tariff provisions which deny service to resellers and sharers are accordingly inconsistent with the principles set forth in I.C.C. v. Delaware, L. & W. R.R. Co., 229 U.S. 235 (1911) (see paragraph 37, supra), and we find them to be unlawfully discriminatory under Section 202(a) of the Act. The discrimination inherent in the "single customer exceptions" will be considered separately (see Appendix E).

63/ We recognize that transportation freight forwarding and resale of communications services and facilities may not be completely analogous activities. We also recognize that the I.C.C. upheld communications common carriers' tariffs prohibiting resale of their private line services and facilities when that agency had jurisdiction over telephone, telegraph, and cable companies. Private Wire Contracts, 50 I.C.C. 731 (1918). Despite the I.C.C.'s rejection of Delaware, L. & W. R.R. Co., supra, as it applied to private wire lessees, we do not view the I.C.C.'s decision as foreclosing our reliance on principles stated in Delaware, L. & W. R.R. Co. In rejecting these principles, the I.C.C. expressly noted that Section 2, under which the I.C.C. and the Supreme Court had found railroads' discrimination against freight forwarders to be unlawful, was inapplicable to telephone, telegraph and cable companies. Private Wire Contracts, 50 I.C.C. at 764. As already noted, Section 202(a) of the Act was modeled in part on Section 2 of the Interstate Commerce Act; thus principles formulated under the latter provision are relevant in assessing the lawfulness of carrier discrimination under Section 202(a). Moreover, the complexity of and demand for communications services has increased substantially since the Private Wire Contracts decision. In enacting the Communications Act of 1934, Congress surely did not intend to limit the Commission to I.C.C. principles in effect prior to 1920. In the Matter of Tropical Radio Telegraph Co., 31 F.C.C. 2d 678, 683 (1971). See also Atchison, T. & S.F. Ry. Co., supra, 387 U.S. at 416.

42. AT&T and GTE take the position that Section 205(a) of the Act, which in part provides that the Commission may order a carrier to eliminate any tariff provision which it finds "is or will be in violation of any of the provisions of this Act", places the burden of proof on those who propose changes in the present tariff restrictions on resale and sharing. (See GTE's Comments at 9; AT&T's Response Comments at 31.) This position is unfounded. We have heretofore rejected the view that the burden of proof is on the carrier only when increased rates are sought under Section 204 of the Act. Tariffs - Evidence, 40 F.C.C. 2d 149, 152 (1973). Moreover, we note that the tariff restrictions on resale and sharing are patently discriminatory and therefore raise questions of lawfulness under Section 202(a). We have repeatedly held, with judicial approval, that carriers have the burden of justifying differential pricing of communication services. Telpak, 38 F.C.C. 370, 381-82 (1964), aff'd sub nom. American Trucking Associations, Inc. v. F.C.C., 377 F. 2d 121 (1966), cert. denied, 386 U.S. 943 (1967); Telpak Sharing Case, 23 F.C.C. 2d 606, 625 (1970). Finally, we observe that the burden of proof properly rests with the carrier when it is the sole repository of information which could establish the lawfulness of its tariffs. Referral of Chastain v. A.T.&T., 49 F.C.C. 2d 749, 750, (1974); Amphison, T. & S.F. Ry. Co. v. United States 218 F. Supp. 359, 374 (N.D. Ill. 1963); Chesapeake & O. Ry. v. United States, 11 F. Supp. 588, 593 (S.D. W. Va. 1935), aff'd 296 U.S. 187 (1935). See also Copley Press, Inc. v. F.C.C., 444 F. 2d 984, 989 (D.C. Cir. 1971); Office of Communications of the United Church of Christ v. F.C.C., 425 F. 2d 543, 547, n. 8 (D.C. Cir. 1964); Bunny Bear, Inc. v. Peterson, 473 F. 2d 1002, 1006 (1st Cir. 1972). The carriers were in a unique position to provide information regarding the economic impact of the removal of the restrictions, both with respect to themselves and to their ratepayers, and we specifically called for such information. They also were in a unique position to explain the criteria upon which they decide that certain users may resell or share communications service, while others are denied these opportunities. In summary, we find that the carriers had ample notice that the lawfulness of their tariff restrictions on resale and sharing were in issue, and that they were being called upon to justify the restrictions and exceptions thereto. The carriers are the ones which placed restrictions on the ability of subscribers to use their services and facilities in a way which is not publicly detrimental, and the carriers thus have the burden of proof of establishing the justness and reasonableness of the restrictions.

LAWFULNESS OF TELPAK RESTRICTIONS

43. We concluded above that the broad restrictions on resale and sharing of private line services are unjust and unreasonable, and unlawfully discriminatory. Parties have filed extensive comments on the restrictions as they apply to one particular offering, Telpak, and we believe that this offering warrants special comment. Telpak is a "bulk rate" offering whereby private line services may be obtained by larger users at a unit cost substantially lower than the rate for the same service in other tariff provisions. Telpak was initially justified as a response to the competition made available by the licensing of private microwave systems. Telpak, 37 F.C.C. 1111 (1964). It is important to note at this point that Telpak was never found to be the only appropriate response to private microwave. Telpak has been the subject of comment in this proceeding because there is in the area of bulk rates a major economic incentive to resell and share. Some of the specialized common carriers, for example, argue that if Telpak is made available for resale and sharing, there will be a shift of customers from their services to a resold or shared AT&T Telpak offering. They argue that AT&T will have an incentive to maintain the Telpak rate below its cost to encourage this shift of private line usage to AT&T, and that resale and sharing of Telpak will thus afford AT&T an opportunity to restrict competition for private line service. Although we recognize the possibility that customers may shift from the specialized common carriers to a resold or shared Telpak, we do not find this to be adequate justification for keeping the restrictions as they now exist. With respect to the argument that removal of the restrictions will provide AT&T with an opportunity to price Telpak in a way which will restrain competition, we point out that the appropriate pricing principles for Telpak will be decided in Docket No. 18128. 64/

44. AT&T's primary justification for retention of the restrictions on the resale and sharing of Telpak is its view that their removal would increase the Telpak fill factor, and as fill increased, AT&T's cost of providing the service would increase until the correspondingly higher rate no longer was attractive. It thus intimates that sharing and resale will lead to the demise of Telpak (AT&T's Comments at 27-8), and Telpak's utility as a competitive response to private microwave would "probably" be destroyed. AT&T does not support these generalizations with any evidence that substantially increased fill and costs would necessarily result from resale and sharing of Telpak; we are not willing to make such assumptions in the absence of a more reasoned analysis than AT&T has provided. Moreover, AT&T's argument

64/ The specialized common carriers' arguments in this regard overlook the fact that they too will be able to buy Telpak from AT&T at the tariffed rates and then resell the service to their own customers. Thus, the shift of customers to AT&T does not necessarily follow.

that the eventual shift away from Telpak would "result in a diminished contribution to overall common costs of the company" (AT&T Comments at 28) is premised on the position that Telpak rates have made and will continue to make contributions "to overall common costs" -- issues which are before us in Docket No. 18128 and which we decline to resolve in this proceeding in support of the restrictions on resale and sharing of Telpak. Even if AT&T's position had merit, and Telpak could not exist without the restrictions on resale and sharing, we find that its continued availability is not as important to the public as are the benefits which we see as resulting from resale and sharing (see paragraphs 75-88, *infra*). As we noted above, we have never found that Telpak is the only bulk offering available as a response to private microwave, and in this proceeding we do not hold that AT&T could not respond to our order herein by making available another bulk offering which is consistent with our policy.

45. At this point, we consider resale of Telpak as distinct from sharing of Telpak. Although the concepts are similar in many respects, separate justifications exist for removing the restrictions now found in the AT&T private line tariff. The general principles regarding Section 202(a) of the Act, set forth in paragraphs 34-37, *supra*, are especially relevant to the resale of Telpak. In *I.C.C. v. Delaware, L. & W R.R. Co.*, *supra*, the Supreme Court held that a carrier could not deny service to a shipper simply because it was not the real owner of the goods. We find that discrimination against a communications customer -- in this case, by the carrier's refusal to provide service to a reseller -- is unlawful if it is based only upon the fact that the customer is not the ultimate user of the service. Likewise, the carrier may not lawfully discriminate by refusing to provide Telpak service to a customer which is a potential competitor. The reseller has a bulk requirement for Telpak service just as does any other customer willing to pay for Telpak. Accordingly, there is no justification for AT&T's refusal to provide Telpak to a reseller, while making it available to a customer which purports to use all the service for its own needs. It is noteworthy in this regard to observe that Telpak was originally justified only because of the existence of private microwave systems as competition with the service provided by AT&T. There is no suggestion in this record that Telpak has ever been restricted to customers which had the capability and desire to switch to private microwave. Instead, the record indicates that Telpak has been offered to any customer -- except a reseller -- which ordered it. ^{65/} Viewed in this light, the prohibition on resale does not in any rational sense advance the purpose upon which Telpak was initially founded; it is instead a discrimination against carriers having a need for the service.

46. Although the foregoing would appear to be applicable to prohibitions on the sharing of Telpak, we find separate justification for requiring the removal of restrictions on the unlimited sharing of

^{65/} However, as we noted in paragraph 5, *supra*, AT&T provides Telpak jointly with Western Union (but with no other carrier). Also AT&T makes available to Western Union (but to no other carrier) "supergroups" of 60 communications channels. Western Union can then resell this bulk offering to its customers. Thus, AT&T has selected one carrier, Western Union, for the joint provision and resale of bulk offerings, but has denied other carriers this opportunity.

Telpak. We begin with recognition of the fact that the lawfulness of Telpak sharing was before this Commission in Docket No. 17457, the Telpak Sharing case. In our decision, 23 F.C.C. 2d 606 (1970), we found that unlimited sharing of Telpak was the best of the alternatives in the record. The Court of Appeals reversed in American Telephone and Telegraph Co. v. F.C.C., 449 F.2d 439 (2d Cir. 1971), because we prescribed unlimited sharing without making the statutory finding. The Court commented:

The impact of [the Commission's] order requiring unlimited sharing is to fix and prescribe rates for application to an enlarged group of customers; and since the lower Telpak rates are not now available to this enlarged group, the order in effect is equivalent to an order requiring a large scale rate reduction. Under § 205(a) the Commission cannot prescribe a rate without finding that the rate prescribed is just and reasonable.

* * *

If Telpak without sharing unlawfully discriminates between bulk users and small users, then the overall Telpak rate structure is unlawful, for the essence of Telpak is a reduced rate limited to large volume users. (449 F. 2d at 451, 452)

The Court went on to find that the Commission rested its requirement of unlimited sharing on the finding that the basic Telpak rate structure was unlawful. The Court found that such action was not permissible because the Commission made no specific finding as to the lawfulness of the Telpak rate structure or any subsidiary findings, such as that:

... the Telpak rate structure was unlawful because the low rates were not justified by the competition of private microwave; that the rates to large customers were not compensatory; or that for some other reason the offering of low rates to only those customers was unlawfully discriminatory. 449 F. 2d at 452 (Emphasis added)

The Court also noted that in Docket No. 17457, the overall lawfulness of Telpak was not in issue, and that the assumption that Telpak itself, without sharing, is unlawfully discriminatory flies in the face of the prior decision upholding the competitive justification for Telpak C and D.

47. Several parties responded to the Notice with the argument that the Commission could not legally require unlimited sharing of Telpak. This position is clearly wrong; no court has -- so held. See 449 F.2d at 453; Nat'l Ass'n of Motor Bus Owners v. F.C.C., 460 F.2d 561, n. 3 (2d Cir. 1972). In considering the sharing of Telpak, we first point out that AT&T has extended the benefits of low Telpak rates to selected non-bulk users.

At first, limited sharing was permitted for certain entities which were eligible to share private microwave; more recently, sharing of Telpak has been permitted by extending service to selected intermediaries acting on behalf of third parties who thereby could aggregate their private line requirements. There is no evidence in this record which justifies the manner in which such intermediaries have been selected. The lawfulness of these "single customer exceptions" is discussed in Appendix E, and we find them to be unlawfully discriminatory.

48. We turn now to the argument raised by AT&T in its Comments (pp. 27-8) that unlimited sharing of Telpak would require its repricing in a way which would "probably destroy its utility as a competitive response to private microwave." (AT&T Comments at 2). ARINC also argued competitive necessity in support of its "single customer" status -- a matter which we discuss in Appendix E. We have rejected ARINC's competitive necessity argument, and we are likewise unable to accept AT&T's unsupported assertion that competitive necessity justifies the retention of the sharing restrictions. As we mentioned in paragraph 44, we do not accept the contention that removal of the restrictions necessarily requires any substantial repricing of Telpak. Even if a repricing were required, we note that AT&T has on several occasions increased the Telpak rates since the service was instituted. There was no showing in this record that these price increases lessened Telpak as a competitive alternative to private microwave; accordingly, we do not view any repricing due to the removal of the sharing restrictions as inherently destroying Telpak as a competitive response. In any event, as we have previously stated (paragraph 43, supra), we have never held that Telpak is the only proper response to any competition from private microwave.

49. The action we take herein is consistent with the Court's decision in its review of the Telpak Sharing case. The Court upheld the Commission's finding that the existing sharing provisions were unlawfully discriminatory, but reversed because unlimited sharing was not warranted to be just and reasonable. Here, we find that the record supports the finding that unlimited sharing is a just and reasonable practice which will bring about important public benefits (see paragraphs 75-88, infra). Although the Court stated that unlimited sharing was equivalent to an order of a "large scale rate reduction," we find that the Telpak offering as it now exists allows sharing at the lower rates by the larger communications users such as the airlines and government. Although a number of users will doubtless receive service at the lower rates now available to larger users, we do not see a "large scale rate reduction" happening. We have concluded (paragraphs 56-62, infra) that AT&T did not adequately quantify the revenue changes which would result from unlimited resale and sharing. Accordingly, we believe that we may require AT&T to remove the unlawful discrimination without determining the exact revenue impact thereof or setting the rates for service provided thereafter. See Georgia Power Co. v. F.P.C., 373 F. 2d 485 (5th Cir. 1967). With respect to the Court's comment that there is an inconsistency between requiring unlimited sharing and authorizing a bulk rate for communications, we note that Telpak is not and has not been a bulk rate in the literal sense of the term. The benefits of

the lower Telpak rates have been extended to large users and selected small users (acting through intermediaries) alike, regardless of whether the customer could or would shift to private microwave if the Telpak rate were not available. When viewed in its actual application, Telpak is not a "bulk rate". It is a pricing scheme which provides a discount to large customers (except resellers) and select small customers. Accordingly, it is not inconsistent with the concept of a bulk rate, justified by competitive necessity, to require that the artificial and discriminatory restrictions on Telpak resale and sharing be eliminated by making the service available to all users willing to pay the applicable tariff charge. ^{66/} In summary, we have examined the lawfulness of the restrictions on resale and sharing of Telpak, in light of the features of Telpak which allegedly make it a unique offering. We find that there is no convincing evidence that either unlimited sharing or resale of Telpak will increase its cost to the point that it is no longer attractive. Even if such repricing did follow, we find that AT&T has failed to show that Telpak would thereby no longer be a competitive response to private microwave, or that any competitive response is still required. We find that Telpak is not now a "bulk rate" but is instead characterized by restrictions on sharing and resale (and exceptions thereto) which are artificial barriers to the enjoyment of the rates except by large users and small users acting through intermediaries upon arbitrary criteria not explained in this record. Thus, we find that the Telpak restrictions are unjust and unreasonable and unlawfully discriminatory under Sections 201(b) and 202(a) of the Act. Moreover, we have considered the record herein and conclude that unlimited sharing and resale of Telpak are just and reasonable.

^{66/} Because we do not have before us a true "bulk rate" available only to large users who would shift to private microwave absent the rate, we need not decide whether sharing and resale restrictions applicable thereto would be just and reasonable.

OTHER CONSIDERATIONS REGARDING LAWFULNESS

A. MTS & WATS

50. We concluded in paragraphs 38-42, supra, that the broad prohibitions on the sharing and resale of private line service were unjust and unreasonable and unlawfully discriminatory. There remain a number of matters which warrant our attention and which relate, in one way or another, to whether some type of restrictions, different from those now existing, would be appropriate. First, however, we explain why we do not require any change in the restrictions on WATS and MTS. 67/

51. As heretofore noted (paragraph 16), AT&T opposes all modifications of its tariff restrictions on resale and sharing except those which the carrier itself makes. However, AT&T's only comment on MTS resale is that it presents fewer problems than resale of other services because both revenues and costs are usage sensitive and that, absent a change in cost disproportionate to revenue, the revenue/cost relationship will remain fixed as costs increase (AT&T's Comments at 18). GTE opposes MTS resale because it would create an unnecessary markup in toll charges; would create an unlimited class of new entities subject to Commission jurisdiction; and would lead to a direct conflict with state regulatory authorities (GTE's Comments at 23). Thus, the carriers do not raise any serious allegations of financial harm in support of their objections to elimination of the tariff provision on resale of MTS.

52. Various parties to this proceeding have requested us to remove the tariff prohibition on resale of MTS. NATA proposes that apartment dwellers should be permitted to share PBX equipment in an arrangement which would have the entire apartment building as the customer of the Bell companies. NATA contends that this will alleviate the capital requirements of the telephone companies, lead to more efficient apartment design, and result in savings on interstate calls to apartment dwellers. Wells National Service Corporation proposes a resale operation involving hospitals. AT&T views both NATA's and Wells' proposal as beyond the scope of this proceeding; it asserts that NATA raises an interconnection question properly at issue in Docket Nos. 19528, 19419 and 19691 and that Wells' proposal concerns the provision of local exchange service (AT&T's Reply Comments at 3).

53. We will not require any change in the prohibitions on MTS resale and sharing. We note that this issue raises difficult questions previously considered by this Commission in 1943. See Special Telephone Charges of Hotels, etc., 10 F.C.C. 252 (1943). At that time we considered the practice of hotels,

67/ Although we only refer herein to AT&T's "monopoly services", our reasoning applies equally to the "monopoly services" of Western Union and the other telephone companies.

apartments and clubs in placing surcharges on interstate toll calls received or sent by guests, tenants, or club members. We found that in placing surcharges on interstate toll calls, these entities were acting as agents of the telephone company and that the telephone company was therefore in violation of Section 203(c) because the surcharges had not been tariffed. We ordered the telephone companies to cease and desist from this practice, and they did so by imposing a prohibition on tariff surcharges.

54. While resale of MTS might not cause any financial harm to telephone companies, the imposition of surcharges on interstate toll calls by hotels, hospitals, and clubs could have an adverse economic impact on certain segments of the using public. However, this record does not contain adequate information with respect to the respective benefits and detriments. The hotel and motel industry, which presumably would be affected by a change in the present tariff prohibitions, did not file comments, nor did any other party submit detailed information on this complex issue. Thus, we believe that it is appropriate not to make any changes in the existing restrictions.

55. With respect to WATS, we note that in A.T.&T., 46 F.C.C. 2d 81(1974), we removed from Docket No. 19129 certain issues concerning the lawfulness of the WATS tariff and placed them in issue in Docket No. 19989, the WATS investigation. Included in those issues was the lawfulness of the restrictions on sharing and resale of WATS. See 46 F.C.C. 2d at 85; Associated Students of the University of Arizona et al., 43 F.C.C. 2d 197, 199 (1973).

In our decision in Docket No. 19989, we stated that we would determine the lawfulness of the restrictions in the WATS tariff in this proceeding. See A.T.&T., ____ F.C.C. 2d (FCC 76-497 released June 2, 1976). The record before us indicates that there are reasons why the restrictions on WATS must be viewed differently from those on private line service. First, although removal of the restrictions might lead to a further equalization of service and rates between large and small communication users, the removal of the restrictions might result in a significant shift of MTS users to the WATS offering. This shift would decrease MTS revenues, possibly requiring a rate increase for MTS, and might lead to an adverse impact on the revenue requirements for intrastate service as a result of changes in the separations data. Moreover, both MTS and WATS are switched services, with characteristics distinct from those of private line service, and we are not prepared to warrant that removal of the restrictions on WATS would lead to the benefits which we foresee for private line service (see paragraphs 75-88, infra). Accordingly, we will not require removal of the restrictions on sharing and resale of WATS. In view of this action, we are not reviewing AT&T's present practices under and interpretation of its MTS and WATS tariffs.

B. AT&T's Economic Impact Study

56. AT&T and GTE both allege that they will suffer financial harm if existing tariff restrictions on resale and sharing are substantially modified. GTE did not support its allegations of financial harm with any studies, but instead requested that the Commission perform its own studies (GTE's Reply Comments at 6). AT&T did submit a limited study supporting its allegations of financial harm (AT&T's Comments, Attachment No. 1). In this study AT&T attempted to estimate revenue and cost effects upon Bell companies following one year of unlimited resale and sharing of Full Business Day WATS and Telpak.

AT&T estimated revenue losses and cost increases due to customer shifts from MTS, Full Business Day WATS and Telpak. In particular, AT&T estimated revenue losses and cost increases due to customer shifts from MTS, Full Business Day WATS, non-Telpak private line services under AT&T Tariff F.C.C. No. 260, and SCC offerings to Telpak; and from Measured Time WATS and MTS to Full Business Day WATS. AT&T did not attempt to estimate the revenue and cost effects upon Bell companies following one year of unlimited resale and sharing of private line services other than Telpak and classes of WATS other than Full Business Day WATS. In particular, AT&T did not attempt to estimate the revenue and cost effects of the following potential customer shifts after one year of unlimited resale and sharing of all AT&T's communications services and facilities: shifts from MTS and WATS to non-Telpak private line services; shifts into or out of Inward WATS; and shifts into Measured Time WATS.

57. AT&T gives two reasons for its failure to supply studies in support of its allegation of financial harm resulting from unlimited resale and sharing of services other than Telpak and Full Business Day WATS. First, AT&T states that it was given insufficient time to perform a complete study detailing all probable effects following elimination of all tariff restrictions on resale and sharing. Second, AT&T states that the time constraint made it necessary to focus solely on Telpak and Full Business Day WATS because these services, in AT&T's opinion, are the most susceptible Bell offerings to unlimited resale and sharing in the first year after all tariff restrictions on these activities are eliminated.

58. We stated in the Notice that allegations of financial harm should be supported by studies underlying these allegations. We further requested that any revenue losses should be shown in dollar amounts and as a change in the rate of return (expressed as a percentage point after adjusting for cost increases). Finally, when no study had been made in support of an allegation of financial harm, because data was unavailable or for other reasons, we stated that "an explanation of the difficulties should be appended, along with a complete discussion of the necessary study. . ." Notice (paragraph 35). By failing to submit studies without explanation GTE has not complied with the procedures specified in the Notice. Although AT&T has submitted a limited study supporting its allegations of financial harm and has stated reasons why a complete study was not undertaken, we find the study to be methodologically defective and the reasons for not doing a complete study to be inadequate.

59. In its study of the revenue and cost effects on the Bell companies following one year of unlimited resale and sharing of Full Business Day WATS and Telpak, AT&T concludes that the resultant negative effect on the Bell Companies - taking into account both revenue losses and cost increases - would be \$178.5 million annually.^{68/} AT&T further asserts that this is a "least loss" estimate because no attempt was made to estimate the revenue and cost effects due to customer shifts between other Bell offerings following unlimited resale and sharing of these offerings. We find AT&T's study to be defective in both the estimations of revenue losses and cost increases due to full resale and sharing of Telpak and Full Business Day WATS.

60. In quantifying the cost effects of unlimited resale and sharing of Telpak and Full Business Day WATS, AT&T has relied upon the costing programs "Private Line Incremental Annual Costs" (PLIAC) and "Incremental Network Costs" (INC), both of which AT&T utilized in Docket No. 19919, the HiLo proceeding. In A.T.&T., 55 F.C.C. 2d 224 (1975), reconsideration denied, 58 F.C.C. 2d 362 (1976), we found that the documentation supporting the PLIAC model was inadequate, and we thus were unable to make a favorable finding relative to the validity of AT&T's cost estimates in that proceeding. 55 F.C.C. 2d at 237. AT&T has submitted no further explanation of the PLIAC programs in this proceeding, and therefore we are compelled to again reject the cost effect estimation in its study.

61. We also find AT&T's revenue loss estimates to be without adequate documentation. The study is replete with unsupported assumptions about customer behavior. For example, AT&T assumes that present business customers of WATS and MTS in major metropolitan areas and large cities (as determined by AT&T's Tariff No. 264) will swiftly shift to Telpak and WATS. Nowhere does AT&T take into account that services over the national telephone network may qualitatively differ from private line services in ways that may make Telpak unattractive to present WATS and MTS customers. And in estimating the revenue effects of customer shifts from MTS to shared and resold Telpak, AT&T assumes a stimulation effect equal to one half of the savings that each customer experiences by making the shift. Nowhere is there any explanation for this assumed value and why it is not higher or lower.

^{68/} As OTP observes, this figure represents only 0.75% of Bell System total annual revenue in 1973 and 2.0% of Bell's 1973 interstate toll service revenue. And OTP further notes that if MTS ratepayers entirely carried the burden of such a decrease in annual revenues and an increase in annual costs, they would have to pay only about 5 cents more per interstate call. Finally, OTP observes that if AT&T's estimated MTS revenue loss were absorbed in interstate toll rates, the increase would be approximately 3.3 cents per call. (OTP's Reply Comments at 30). Also, because we are not requiring the removal of the restrictions on WATS, any revenue effect based on AT&T's methodology would be less than \$178.5 million.

62. Other illustrations of unsupported assumptions could be given, but we think that one assumption by itself compels us to reject AT&T's study. The entire study is predicated on the assumption that Telpak and WATS rates stay constant despite substantial shifts of customers into these services and despite the usage sensitive nature of Telpak and WATS rates. However, this assumption contradicts two of AT&T's basic positions: that unlimited resale and sharing of Telpak will probably lead to higher Telpak rates and perhaps elimination of the Telpak bulk discount; and that unlimited resale and sharing of WATS may lead to upward repricing of WATS. Because AT&T's entire study rests on an assumption contradictory to basic AT&T positions, we feel compelled to reject the conclusions of the study.

C. Other Private Line Services

63. FX service is private line service which is connected with the switched telephone network at one end; the private line may be one point-to-point line, or a through connection of several private lines. A CCSA is a particular manner in which through connections of private lines may be automatically configured for given periods of time.

The FX and CCSA offerings are private line offerings, and we find no reason to treat them differently from other private line services which are now to be made available for unlimited resale and sharing. AT&T did not provide any economic impact study relative to these services, nor did it advance any special reasons for considering the restrictions as they apply to FX and CCSA as any different from those on other private line service.

64. Unlimited resale and sharing of a private line service does not, of course, encompass the conversion of that private line service into MTS or the equivalent thereof. Thus, any resale or sharing of FX service must maintain the basic private line character of that service. Under present policy, to qualify as a private line service, at least one aspect of the service must be a dedicated facility not used or useable for local telephone exchange service.

44.

65. Before discussing the effect of resale and sharing of private line service other than Telpak or FX, we note that in 1974, only \$560 million, or 6%, of AT&T's total interstate revenues came from non-Telpak private line service. Of this amount, \$454 million, or 82%, came from voice grade and under private line service which allowed joint use arrangement; \$471 million came from private line service allowing, in addition, resale by composite data service vendors. Thus, the economic impact of elimination of the restrictions in this area is not significantly large. Nonetheless, AT&T has opposed shared use of all discrete broadband offerings, and we will separately consider certain of its objections. The amount of revenue shift for these services was not studied by AT&T, as noted in paragraph 56, supra.

66. Heretofore, individual voice telephone and other voice grade channels have been available under Series 2000, 3000, and 4000. If Series 8000 were opened up to resale and all forms of sharing, the using public could now obtain individual voice telephone and other voice grade private line channels through resale and shared use of Series 8000 private line service. Similarly, individual teletypewriter and other telegraph grade private line channels have heretofore been available under Series 1000 through Series 4000. If Series 8000 were opened up to resale and all forms of sharing, the using public could now obtain individual teletypewriter and other telegraph grade services through resale and shared use of Series 8000 service. Heretofore, sharing under Series 1000, 2000, 3000 and 4000 has been limited to joint use arrangements. Removal of the general tariff prohibition on resale and other intermediary activities would allow the using public to engage in other forms of sharing with respect to voice grade and under private line services. In particular, sharing through a non-profit intermediary entity would be an alternative to joint use arrangements under Series 1000, 2000, 3000, and 4000. Heretofore, resale of Series 1000 through 4000 and Series 8000 service has been permitted to a limited extent by composite data service vendors. At this time, we cannot predict the additional private line services which would be made available from resale of private because of the rapid growth in technology that resellers could employ in connection with AT&T's transmission facilities.

In summary, removal of the general prohibition on resale and shared use with respect to Series 1000 through 4000 and Series 8000 would

mean that voice grade and under private line services could now be obtained under Series 8000 as well as under Series 1000 through 4000; that all forms of sharing would now be available to the public in their utilization of Series 1000 through 4000 and Series 8000; and that the public could now take advantage of additional point-to-point and multi-point voice grade and under private line services offered by resale entities.

67. AT&T has objected to resale and sharing of Series 8000 voice grade channels, apparently because this may lead to revenue loss from Series 2000 through 4000 services if users shifted to Series 8000 in order to satisfy voice grade private line requirements: Thus, AT&T may therefore be compelled to upwardly reprice Series 8000 service, and present Series 8000 customers may, as a result of these rate increases, discontinue taking service from AT&T. Although AT&T has nowhere expressly invoked the competitive necessity doctrine as justifying the maintenance of current Series 8000 rates, insofar as they are lower than rates under Series 2000 through 4000 for comparable services, competitive necessity appears to underlie AT&T's objection to resale and shared use of Series 8000 voice grade channels. A showing of competitive necessity would require that the carrier show that three criteria are met. See the Telpak Sharing case.^{69/} In this proceeding, AT&T has not even attempted to meet any of these criteria. AT&T has made no efforts to establish that present Series 8000 customers would switch to competitive alternatives but for present Series 8000 voice grade channels rates; that present Series 8000 rates per channel are just sufficiently discounted from Series 2000 through 4000 rates to prevent customer losses to competitive alternatives; and that Series 8000 rates for voice grade private line services are compensatory. Having failed to establish competitive necessity in justification of Series 8000 voice grade channel rates, AT&T may not assert that it will lose present Series 8000 customers if Series 8000 rates are increased. And increased Series 8000 rates would allow AT&T to recoup any revenues lost from Series 2000 through 4000 due to full sharing of Series 8000 voice grade service. Moreover, an increase in Series 8000 rates may be unnecessary if full resale and sharing of Series 8000 channels leads to decreased costs to AT&T in the provision of voice grade private line services. Thus, it may be that AT&T can provide 12 voice grade channels in bulk more cheaply than it can provide individual voice grade channels. Therefore, any decrease in Series 2000 through 4000 revenues due to full resale and sharing of Series 8000 voice grade service may be somewhat offset by decreased costs to AT&T in providing voice grade private line service. AT&T has failed to demonstrate that the discounted Series 8000 voice grade channel rates are not wholly related to cost savings in providing

^{69/} See footnote 4, supra.

the bulk voice grade channel offering. Without this showing, it is as reasonable to conclude that AT&T will benefit from full resale and sharing of Series 8000 voice grade service as it is to conclude that AT&T will be adversely impacted from full resale and sharing of Series 8000 voice grade service.

68. Likewise, we view AT&T's objections to resale and sharing of Series 6000 and 7000 to be without merit. Because these offerings consist of one-way transmission facilities, present customers of Series 6000 and 7000 - specifically, radio and television networks - would seem to be the only customers who stand to benefit from shared use of Series 6000 and 7000. By contrast, present customers of voice grade and under private line service, which generally have a need for 2-way transmission facilities, would be unlikely candidates for sharing Series 6000 and 7000 channels. Additionally, Series 6000 and 7000 channels are broadband channels. To provide even one-way voice transmission, resellers or sharers would have to undertake substantial investment in multiplexing equipment. This additional cost, we believe, makes resale and sharing of Series 6000 and 7000 unlikely even for a one-way voice grade channel service. But AT&T seems to argue that a Commission order removing the tariff prohibition on resale and shared use of Series 6000 and 7000 offerings would require AT&T to undertake construction of two-way transmission facilities to replace the existing one-way transmission facilities for video and audio transmission in order that customers who presently receive service on Series 100 through 4000 private line channels could satisfy their communications requirements by shared use of Series 6000 and 7000 channels. If this is AT&T's position, it has misconstrued the objectives of this rulemaking. Our inquiry is limited to the question whether tariff restrictions on resale and shared use of existing or future communications services and facilities offered at the carrier's initiative are lawful under Sections 201(b) and 202(a). In this proceeding our objective is not to determine whether carriers should change the physical characteristics of their present offerings. Thus, we do not view removal of tariff restrictions on resale and shared use of Series 6000 and 7000 as creating any substantial additional costs for AT&T resulting in a loss of revenues from Series 2000 through Series 5000 because customers for these voice grade services are unlikely to shift over to Series 6000 and 7000 offerings if shared use of these offerings were permitted.

69. DDS channels are similar to those of telephone and wideband channels in that they may be used as individual data links or connected into complex networks. Under a joint use arrangement, they can be shared on an alternate use basis, or through the use of TDM-derived sub-channels. As we have heretofore noted (paragraph 32, supra), sharing of DDS is permitted subject to the other tariff restrictions which we have discussed. It appears from the nature of

the service that sharing of DDS would be attractive if sharing of other services were not permitted. In considering the impact of the removal of resale restrictions on DDS to allow resale by entities other than CDSVs, we are hampered by the fact that DDS is a relatively new offering and accounts at present for only a small portion of AT&T revenues. However, it may be concluded that resale and sharing of DDS would not bring about any substantial shift from the AT&T bulk offering or monopoly services.

70. In its Reply Comments (p. 10), AT&T states that the question whether the DDS resale and sharing provisions are just and reasonable is at issue in Docket No. 20288, and it does not discuss those provisions or the economic impact of their removal. It is true that in the designation order in Docket No. 20288, American Telephone and Telegraph Co., 50 F.C.C. 2d 501 (1974), we stated that included in the investigation was to be consideration of whether the terms and conditions for resale and shared use, as reflected in the tariff filing, were just and reasonable. 50 F.C.C. 2d at 515. However, we also stated that information in that proceeding would provide data regarding the matters under consideration in this proceeding and that "the economic and technical aspects of more widespread resale and shared use" of DDS should be investigated in that proceeding. 50 F.C.C. 2d at 512. We believe that it is within our authority to decide the lawfulness of the restrictions on resale of DDS in this proceeding, and we find no justification for limitation of resale to CDSV carriers. We hereinafter set forth (paragraphs 75-88, infra) the public benefits to be derived from resale and sharing of the AT&T private line services, and we believe that the conclusions set forth therein are equally applicable to DDS. We need not await the conclusion of Docket No. 20288 to require that the unlawful discrimination against entities other than CDSVs be eliminated, and we conclude that unlimited sharing and resale of DDS is the just and reasonable practice.

D. Restrictions of Other Carriers

71. Western Union offers private line service under Western Union Tariff F.C.C. No. 254. Its tariff restrictions on resale and sharing of private line service basically parallel AT&T's restrictions. Resale is expressly prohibited, and each customer must have a "communications requirement of his own for . . . use" of the private line service. 70/ Additionally, both joint use and authorized use

70/ Western Union Tariff F.C.C. No. 254, Sections 2.2.3, 2.5.

arrangements are permitted. Western Union's authorized use provisions are less restrictive than AT&T's provisions: authorized users need not be in the same line of business as the customer 71/, but, if they are in the same line of business, transmission of communications between authorized users is allowed 72/

72. Western Union did not perform a study as to the effect of resale and sharing on its services. It stated that it was impossible to conduct a study of potential impact "absent knowledge of the extent of the proposed resale, and the services and markets involved" This reasoning is not persuasive, in view of the fact that Western Union could have made various assumptions of its own to demonstrate the impact of unlimited resale and sharing of its services, or a limited study with respect to the elimination of restrictions on one particular service. For the reasons set forth in our discussion of the lawfulness of the AT&T tariff restrictions (see paragraphs 38-42, supra), we find the Western Union restrictions on sharing and resale of private line service to be unjust and unreasonable and unlawfully discriminatory. However, as with AT&T, we do not require the elimination of restrictions on monopoly services. We recognize that the action which we are taking may stimulate services which compete with Western Union's "monopoly services." However, competition of this nature is already available to some extent under Commission policy, and we see no reason why elimination of the Western Union restrictions will preclude it from competing effectively in all phases of the resale market. 73/ We conclude that

71/ Id. at Section 2.2.1(B). As heretofore noted, AT&T requires that all authorized users be in the same line of business as the customer. AT&T Tariff F.C.C. No. 260, Section 2.2.1(B).

72/ Id. at Section 2.2.1(C).

73/ As OTP notes (Reply Comments at 31-2), Western Union already acts as an intermediary making extensive use of AT&T services, and offers a number of services through unregulated subsidiaries. Moreover, the market for Western Union's private line services may be stimulated by the demand by resellers and sharing arrangements for its underlying transmission capability.

it would not be in the public interest to withhold liberalization of private line resale and sharing, because there is no showing that there will be a detrimental impact on its Public Message Telegraph and Telex services.

73. With respect to the specialized common carriers and the domestic satellite carriers, we will not set forth their restrictions on sharing and resale. In view of our decision that the AT&T tariff restrictions are unlawful, except as to the monopoly MTS and WATS offerings, we conclude that no reason exists to treat other carriers in any different manner. Accordingly, we find unlawful such tariff restrictions which are inconsistent with our decision herein. We recognize that the expansion of sharing and resale of communication service will have an impact upon these carriers. They may face a loss of business from individual users sharing wide channel service or accessing DDS channels through resellers. On the other hand, technically sophisticated user groups and brokers should represent attractive aggregated markets for specialized and satellite carrier services. Thus, ARINC, which serves as a broker to the airlines, has ordered lines from one of the specialized carriers. 74/ Further, as OTP notes (Reply Comments at 32-3), these carriers can enter the brokerage market themselves to take advantage of the very tariff rates which might otherwise dissuade them from constructing their own facilities.

74. The International Record Carriers (IRC) have commented about the lawfulness of restrictions on sharing and resale in view of their positions with respect to foreign governments. RCA Globcom states the problem:

. . . the foreign end of each international communications circuit is generally owned and operated by an entity or instrumentality of a foreign sovereign state. Communication is, of course, not possible without the agreement of such foreign entity.

RCA states that the resale of international communications service is contrary to the "thrust and emphasis" of the C.C.I.T.T. 75/ Recommenda-

74/ ARINC Comments, footnote 49.

75/ The International Telegraph and Telephone Consultative Committee of the International Telecommunication Union.

tions. Accordingly, it recommends that the Commission not unilaterally adopt substantive policies regarding the resale of international services and facilities without coordinating with interested foreign administrations

(Comments at 7). ITT also states that the international telecommunications administrations are generally opposed to the resale of international services and facilities. We have considered the views that the IRCs should not be subject to our policy regarding resale and sharing of their services, or, in the alternative, that resale and sharing should be required only if the foreign entity agrees to such practices. Neither position is, in our view, consistent with the statutory obligation of the IRCs as common carriers subject to our jurisdiction. First, the IRC objections are vague and do not establish a reasonable probability of harm. Moreover, we have found that the prohibitions on resale and sharing are unjust and unreasonable, and unlawfully discriminatory under Section 201(b) and 202(a) of the Act. We may not exempt the IRCs from bringing their tariffs into agreement with our interpretation of the law simply because a foreign entity does not agree with us, for whatever reason. As we have recently held, our jurisdiction over the charges (and practices) of the IRCs is not dependent upon the agreement of their foreign correspondents. See AT&T, 50 F.C.C. 2d 1103 (1976).

PUBLIC BENEFITS OF RESALE AND SHARING

75. Although we disagree with OTP in certain respects - specifically, its position that resale is not a common carrier activity and its view that regulation of resale would be contrary to the public interest - we do agree with OTP that numerous public benefits would ensue from unlimited resale and sharing activities, which in part entails elimination of underlying carrier tariff restrictions on resale and sharing. Removal of these tariff restrictions on resale and sharing would create further pressures on carriers to provide their services at rates which are wholly related to costs. When similar services are available from a single carrier, but one service is available in unit quantities while the other service is available on a bulk discount basis, resale and sharing of the bulk quantity service would compel the carrier to price the bulk offering at rates wholly related to cost savings in providing the bulk quantity. If the carrier priced the bulk offering at rates not wholly related to attendant cost savings, a reseller could profitably subscribe to the bulk quantity, pay the bulk rates, and resell the capacity in unit quantities at rates below the tariffed unit quantity rate. The underlying carrier would then have to realign the relationship between unit and bulk rates to make that relationship wholly cost related or else lose the business of small-volume users who shift their demands to the reseller. The same pressures on the underlying carrier would ensue if small volume users aggregated their communications offerings to take advantage of the bulk discount rates. In neither of these instances does the underlying carrier lose business to another carrier in the literal sense. Rather, the underlying carrier continues to provide the service, but its customer becomes the reseller or sharing intermediary. To the extent that the service offered is cost related, the underlying carrier is not adversely affected by the change in its relationship with the ultimate user. In fact, the shift to providing service through an intermediary may reasonably be expected to stimulate demand for underlying carriers' communications services and facilities.

76. While we recognize that deviations from cost-related pricing may on occasion be in the public interest, it has long been our policy that carriers should basically price according to service costs and that exceptions from this principle must be clearly warranted. Private Line Rate Cases, 34 F.C.C. 244 (1961); 34 F.C.C. 217, 231 (1963). If a carrier recognizes that its communications services and facilities can be resold or shared, it will price them according to costs. If the carrier chooses to deviate from this pricing technique, it will have to ask that a particular service offering be exempted from resale and sharing, and provide the necessary justification therefore. The Commission can then decide whether the proposed deviation is clearly warranted prior to commencement of the service. In this way, we believe that resale and sharing will serve as a vehicle for efficient enforcement of Sections 201(b) and 202(a) of the Act.

77. We also expect the using public to benefit from resale and sharing through better management of specialized communications networks. As OTP notes, resellers will have an economic incentive to produce cost savings for their customers in order to justify their services (OTP's Reply Comments at 25). AT&T argues that resellers would not provide the using public with better management of communications networks (AT&T's Response Comments at 17-18). First, AT&T asserts that the public can presently take advantage of communications consulting firms. AT&T also contends that resellers would be primarily interested in reselling communications services and facilities rather than providing advice to the using public.

78. We are not persuaded by either of AT&T's arguments. We believe that the reseller will have significantly different, and potentially greater, interests in and capabilities for specialized network management than will either consulting firms or the underlying carriers. Because the reseller has a direct economic interest in the specialized network it will manage, there are substantial direct incentives for efficient and innovative management not characteristic of the consulting firm. On the other hand, because the reseller will operate in a highly competitive yet limited scope environment, with no large monopoly service to place large demands on its talents and resources or to provide a cushion against competitive inroads, its interests and expertise in managing the very specialized networks with which it is involved may well be more finely honed than those of the underlying carriers. This in turn will provide both the incentive and the capability for the reseller to provide extensive advice and assistance as part of its network management function, in order to make its service offerings as attractive and responsive as possible.

79. We also expect that non-profit intermediaries will provide user groups with better management of their communications networks. This will be especially true when the intermediary is collectively owned by the user group, as ARINC is owned by airlines which it services. ARINC considers itself to exemplify the benefits which OTP predicts will flow from intermediary activities (ARINC's Response Comments at 3). While the airlines might obtain management expertise if they hired outside consultants, they apparently have found - as we would expect - that the direct financial and operational involvement of ARINC provides significant benefits.

Although ARINC serves a user group made up of entities from the same industry, we believe that intermediary sharing by entities from diverse industries will also lead to better management of communications networks (see also paragraph 126, infra).

80. We also believe that underlying carriers will benefit from the management expertise provided by resellers and non-profit intermediaries to the using public. Contrary to AT&T's contention that intermediaries will create forecasting problems for the Bell companies, we view intermediary activity as assisting the Bell companies in forecasting user demands. Whereas the underlying carrier is concerned with meeting the diverse needs of large segments of the using public, the reseller or non-profit intermediary will be concerned with the needs of a few user groups and should be in closer touch with those user groups than the underlying carrier. Consequently, the intermediary entity will develop better demand information than the underlying carrier, and this demand information will be conveyed to the underlying carrier when the intermediary orders communications services and facilities. Accordingly, at this time we view AT&T's assertion that forecasting problems will arise as speculative. Moreover, as OTP notes (Reply Comments at 31), the carriers can insulate themselves to some extent from uncertainties in demand by requiring resellers to absorb some of the uncertainty (by requiring termination charges, etc.).

81. We foresee expanded resale and sharing as resulting in the future development of a two-tiered interstate telecommunications industry and market structure. The first tier will be comprised of carriers offering basic communications channels and switching services in two markets -- to the public at the "retail" level, and to other common carriers and resale carriers at the "wholesale" level. The second tier will be comprised of carriers and other entities leasing the preponderance of their communications plant from the first tier carriers for the ultimate purpose of reselling these to the public sector -- either directly in the form of point-to-point communications channels, or implicitly, when these channels and switching facilities are combined to form a switched private line data or voice communications service, or a communications based data processing service.^{76/}

^{76/} In its filing, Telenet maintains that although a resale entity may not have a large investment in transmission plant, the investments in switching computer hardware and software may indeed be large enough to approach the natural monopoly condition. Assuming, arguendo, that this may be so under some circumstances, the foreseeable second tier industry structure and regulatory climate does not impose such conditions, but rather allows participants to reach such a state as a result of normal market development.

82. The first tier carrier sector will doubtless be characterized by the capital-intensive financial structure of its participants as it is now. Investments may be expected to be concentrated in terrestrial and satellite transmission facilities, and in time and space division switching plant. The basic conformation should include, as it does today, a nationwide network of intercity terrestrial microwave and coaxial facilities comprising thousands of voice and data channels provided by the Bell System, the independent carriers, Western Union, and the other common carriers. These terrestrial facilities will be augmented with the satellite transmission circuits offered by the multiple entrants in the domestic satellite transmission facilities and service market. This combined transmission plant, and any associated switching service, will continue to be made available with a wide variety of options for bandwidth and data speed, among point-to-point and switched digital and analog channels. The second tier carrier may also offer fundamental service at the retail level, using a transmission and switching plant leased entirely or in part from a first tier carrier.

83. The second tier carrier may also serve specialized submarkets not served by the first tier carriers, offering fundamental communications services. Indeed the scope of possible second tier services embraces the entire spectrum of market activity considered in the Computer Inquiry. (See paragraph 118, infra). Potential service offerings by resale entities thus include, inter alia: (a) private line data and voice switching, (b) resale of point-to-point circuits derived by multiplex equipment from a leased circuit, (c) resale of private line circuits obtained from any bulk rate offerings of first tier carriers, (d) brokerage of first tier private line service offerings, and (e) hybrid communications service.

84. In short, we see a potential merging, in whole or in part, of the resale, specialized carrier and data processing industries into a highly competitive "information handling" industry, employing a combination of wholly-owned facilities, customer-provided facilities, and services and facilities provided by the underlying carriers. Because none of these activities, either separately or collectively, now exhibits substantial economies of scale or other natural monopoly or essential public service characteristics, we see no reason at this time to limit the various service combinations which may be offered. We will consider the regulatory implications of this finding in paragraph 118, infra.

85. With certain exceptions private line service is available on a full-time, minimum period basis. A private line customer may have a communications requirement justifying the acquisition of a private line even though the customer's requirement is for less than

full-time communications. We believe that this phenomenon is fairly common and that a substantial amount of private line capacity is wasted as a result. Further resale and sharing of private line services should reduce this waste and lead to a more efficient utilization of private line service. In the long run, this should benefit all ratepayers because underlying carriers will be able to satisfy the same quantum of communications requirements at lower costs, thereby resulting in lower rates. Another form of waste may arise when a private line customer has a communications requirement for data transmission at a speed which does not match the carrier's offerings. In order to satisfy this communications requirement the customer must acquire private line service of bandwidth in excess of that needed to satisfy its requirement. The excess bandwidth represents wasted capacity. We also believe that this is a fairly common phenomenon, and that resale and sharing will reduce this waste, thereby leading to more efficient utilization of private line capacity and ultimately lower rates.

86. We also believe that greater availability of communications services and facilities will create additional incentives for research and development. Resellers will want to employ the latest technological developments in order to make the most efficient use of the carriers' transmission capacity. By the same token, underlying carriers will have a new incentive to introduce new transmission technologies as soon as they develop, knowing that otherwise they may lose business to resellers. We view as unfounded the contention made by GTE (GTE's Response Comments at 12) that resellers will try to freeze technological developments by opposing an underlying carrier's improvements of its communications plant. And any such opposition would, in any event, be subject to Commission review. Resellers should be cognizant of the risks inherent in their venture into the communications field. Carterfone, supra, 13 F.C.C.2d at 424.

87. Finally, we believe that the expanded resale and sharing provisions ordered herein, and the second tier of carriers we expect to evolve as a result thereof, will not significantly harm - and may in fact benefit - the underlying carriers themselves. It is a well known principle of economics - amply demonstrated throughout the history of telecommunications - that the introduction of new sources of supply and/or service offerings results in an expansion of the market demand. Where, as here, these new sources and service offerings are possible without the addition of significant investments or resources, it is particularly advantageous. We fully expect the total market for specialized telecommunications services to grow as a result of this action. Admittedly, the rates for the underlying carriers' services (particularly for bulk offerings) will be forced toward relevant costs - although we would expect a lessening of the tendency to price private line services below relevant costs, when this provides no competitive advantage to the underlying carrier vis-a-vis its specialized carrier or other competitors.

But the increased revenue-producing usage as well as the more efficient utilization of the underlying carriers' services and facilities by the resellers should substantially if not completely offset any adverse economic effects.

88. In summary, we reasonably expect the following benefits to result from elimination of all tariff restrictions on resale and sharing of private line services: a further trend toward cost-related pricing by underlying carriers; a reduction in the public resources devoted to enforcement of Sections 201(b) and 202(a); more efficient utilization of existing communication capacity; better management of communications networks; improved marketing of communications services and facilities; a wider variety of communications offerings; and increased research, development, and implementation of communications technology. Recent history suggests that this will be so. For example, in November, 1969 Datran, a new SCC, filed its request for authorization, granted in April, 1972, for a new switched digital data service (34 F.C.C. 2d 306). Bell responded competitively with an authorization request in October, 1972 to construct its non-switched Digital Data System utilizing in part unused frequency space in its existing microwave system through a new technique called Data Under Voice (47 F.C.C. 2d 586). Since Carterfone, we have witnessed similar developments in the terminal equipment market, with both AT&T and the various independent manufacturers striving to outdo one another in technological and service improvements. We believe that resolution of many of the issues in this proceeding need not await development of detailed proof of the benefits. It is sufficient that our expectations be reasonable conclusions. National Association of Regulatory Utility Commissioners v. F.C.C., 525 F. 2d 630 (D.C. Cir. 1976).

JURISDICTION

89. In the Notice (paragraph 27) we stated:

PCI, Graphnet, MDT and Telenet have all filed for Section 214 certification on condition that it is required. When determining the reach of our regulatory jurisdiction under Section 214 the principal question is whether or not a communications service for hire is being offered to the public and not on the operational characteristics of the provider. It is well settled that Section 214 authorization is required for the operation of, or transmission over or by means of, interstate lines derived from another carrier's plant. [Citing Mackay Radio and Telegraph Company, 6 F.C.C. 562 (1938)]

Parties responding to the Notice were virtually unanimous in adopting the position we set forth therein, which presumed that the resale of communication service was common carriage subject to Title II of the Communications Act. However, OTP, in its Reply Comments, takes the view that resale is not subject to common carrier regulation under the Act. In view of this position, to which a number of parties have responded, we will consider the applicability of Title II regulation to the resale and sharing of communications services.

9. It has been suggested that the degree of competition in the shared use and resale areas should determine whether we should exercise any regulatory control over the industry. OTP argues that economic regulation such as that under Title II is justified solely by the presence or likely emergence of monopoly power either by "natural monopoly characteristics" or by governmental grant of a franchise; that Title II was designed to protect against potential abuse of monopoly powers; and that the regulatory controls contained therein were not designed for use in a "normal competitive business environment." OTP maintains that communications brokerage (which, OTP states, includes shared use and value added service) is not characterized by

monopoly features and should therefore be unregulated. 77/
The Department of Justice agrees with the OTP and states that "We find it difficult to conceive of any manner in which the brokerage of communications services could expose the public to the potential abuses of monopoly pricing which warrant common carrier regulation." (DOJ Reply Comments at 3). DOJ sees the existence of strong competition for brokerage services from the regulated carriers, and states that the imposition of common carrier regulation might deprive the public of the benefits of innovation which would be expected in a competitive setting.

91. In response to OTP's position, Telenet claims that there are "natural monopoly" characteristics in the value added network business, and that the economic studies relied on by OTP underestimated the fixed capital requirements for the value added carriers and the maximum achievable economies of scale. Thus, Telenet takes the position that it is too early to determine whether the value added networks will or will not ultimately exhibit natural monopoly characteristics. Telenet also takes issue with the view that the regulation of communications is appropriate only when there is a monopoly or likely emergence of a monopoly; rather, it argues that the Commission must assure that "competition is fair, that the public is served without discrimination, and that other essential communications services are not adversely impacted to the detriment of the public interest." (Telenet Response Comments at 15).

77/ In support of this argument, OTP urges that the brokerage industry has certain economic characteristics such as the absence of need for substantial investment to enter the field and an exhaustion of the economics of scale at a fraction of the estimated market.

92 . Although the policy considerations discussed in the preceeding two paragraphs are relevant to the nature of the regulation which we adopt (see paragraphs 102 to 129 , infra), we are of the view that the essential issue is whether entities providing shared use and resale services are common carriers as that term is used in the Act. ^{78/} As the United States Court of Appeals for the District of Columbia, recently concluded in two cases styled identically, ^{79/} the definition of a communications common carrier set forth in the Communications Act is circular and unhelpful. Inasmuch as the legislative history of Section 3(h) of the Act (47 U.S.C. §151(h)) also fails to set forth a cogent explanation of communications common carriage, we, like the courts, must search judicial and administrative decisions to determine the legal characteristics of communications common carrier.

93. OTP also recognized the obvious circularity of Section 3 (h) of the Act, and thus relied on judicial decisions to support its contention that resale activities do not constitute common carriage, "in the ordinary sense of the term," and that Title II of the Act therefore does not apply to resale activity because it was intended to govern common carriage only "in the ordinary sense of the term." Noting that Title II was largely modeled upon the Interstate Commerce Act, OTP states that it is helpful to look at the regulatory treatment of freight forwarders under the latter act. First, OTP observes that freight forwarders by railroad were held to be shippers in their relationship to railroads. ICC v. Delaware, L&W. R.R. Co., 220 U.S. 235 (1911); Great Northern R.R. v. O'Connor, 232 U.S. 508 (1914); Lehigh Valley R.R. Co. v. United States, 283 U.S. 501 (1930). Secondly, OTP notes that the ICC, with judicial approval, held that freight forwarders by motor vehicle were not common carriers because they were not engaged in carrying merchandise directly. Acme Fast Freight v. United States, 30 F. Supp. 968 (SDNY 1940), aff'd per curiam, 309 U.S. 638 (1940). Finally, OTP notes that the Interstate Commerce Act had to be specifically amended in 1950 to bring freight forwarders within the ambit of common carrier regulation. Based on this treatment of freight forwarders, OTP concludes that communications services offered by intermediaries do not constitute common carriage "in the ordinary sense of the term."

^{78/} Section 3(h) of the Act provides that: "'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such a person is so engaged, be deemed a common carrier."

^{79/} National Ass'n of Reg. Util Comm'rs v. F.C.C., 525 F. 2d 630 (D.C. Cir. 1976) cert. denied, U.S. (1976); National Ass'n of Reg. Util. Comm'rs v. F.C.C., No. 75-1075, ___ F. 2d ___ (Feb. 10, 1976).

94. As heretofore noted (paragraph 37) we concur with OTP's view that the treatment of freight forwarders under the Interstate Commerce Act is helpful to resolution of certain issues in this proceeding, but we disagree with OTP's reading of the freight forwarding precedents and its application of these precedents to determine our jurisdiction over resale and sharing.

95. OTP commences its argument by referencing language in the conference report accompanying the bill which became the Communications Act of 1934. This language refers to Section 3(h) as not including any person who is not a "common carrier in the ordinary sense of the term." It is not clear, however, that this language was intended to apply to anything but press associations:

It is to be noted that the definition does not include any person if not a common carrier in the ordinary sense of the term, and therefore does not include press associations or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor. H.R. Conf. Rep. No. 1918, 73rd Cong., 2d Sess., at 46 (1934).

Nevertheless, press associations may have been treated as merely an example of persons and entities which were not to be treated as common carriers "in the ordinary sense of the term" Therefore, we shall proceed to review the transportation precedents cited by OTP and their relevance to the regulatory status of resale and sharing entities under the Communications Act.

96. OTP, citing several Supreme Court decisions (para. 93, supra), states that the Court affirmed the I.C.C.'s position that freight forwarders by railroad were not common carriers. However, the I.C.C. viewed these decisions differently than OTP. In the Freight Forwarding Investigation, 229 I.C.C. 201 (1938), the I.C.C. considered these decisions insofar as they related to the I.C.C.'s jurisdiction over freight forwarders by railroad. Noting that the Supreme Court had recognized freight forwarders as shippers "in their relation to the rail lines," 229 I.C.C. at 299, the I.C.C. observed that the Supreme Court had never assessed the regulatory status of freight forwarders under the

Interstate Commerce Act in their relationship to the public because:

The question whether forwarders, in their relation to the public in general, are common carrier agencies upon a set of facts similar to those disclosed on this record was not important in the cases wherein the courts held that forwarders were shippers in their relation to the rail lines. 229 I.C.C. at 299.

The I.C.C. concluded that freight forwarders by railroad normally "possess characteristics of a common carrier in relation to the public" Id. Upon review of the Supreme Court decisions cited by OTP and other transportation precedents, we concur with the I.C.C.

97. A transportation common carrier has been defined by the Supreme Court as " . . . one who undertakes for hire to transport the goods of those who may choose to employ him from place to place." The Propeller Niagara v. Cordes, 21 How. 7, 22 (U.S. 1858) A principal word in that definition is the verb "undertake": common carrier status under common law depends upon the nature and extent of the undertaking rather than upon ownership or operation of the means of transportation. See Ahearn, "Freight Forwarders and Common Carriage," 15 Ford. L. Rev. 248, 257 (1948) and cases cited therein. Thus freight forwarders were held to be common carriers at common law even though they generally did not control the means of transportation Read v. Spaulding, 18 N.Y. Superior Ct., 395, 404 (5 Bosworth 1859), aff'd 30 N.Y. 630 (1864); Cownie Glove Co v. Merchants' Dispatch Transportation Co., 130 Iowa 327, 329 106 N.W. 749, 750 (1906). We do not believe that Congress intended to reverse the common law status of freight forwarders when it enacted the Interstate Commerce Act in 1887. On the contrary, it appears that Congress simply intended to regulate only one class of transportation common carriers, namely railroads, in 1887. Express companies were also considered to be common carriers at common law; although recognizing their status as common carriers, the I.C.C. held that they were not subject to the Act as it read in 1887. 1 I.C.C. 677, 682 (1887). An express amendment to the Act was necessary before the I.C.C. could apply common carrier regulation to express companies. Similarly, freight forwarders apparently were exempt from I.C.C. regulation not because they were not common carriers but because the services they provided did not constitute "transportation service" or services "connected with such transportation" within the meaning of section 15 of the Act, 49 U.S.C. §15, as amended. Lehigh Valley R.R. Co., supra, 243 U.S. at 446-47. Thus, the I.C.C.'s jurisdiction over transportation

common carriers depended upon the means of transportation as well as the nature of the undertaking. This principle also extended to freight forwarders by motor vehicles. The I.C.C. awarded certificates of public convenience and necessity to freight forwarders only when they leased or otherwise controlled the motor vehicles by which goods were transported. In Acme Fast Freight, supra, the courts affirmed the ICC's refusal to certify those Acme operating divisions which did not lease or otherwise control motor vehicles. Section 203(a)(14) of the Interstate Commerce Act, 49 U.S.C. §203(a)(14), as amended, defines a common carrier by motor vehicle as any person:

who . . . undertakes, whether directly or by a lease or any other arrangement, to transport . . . property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of . . . freight forwarders . . .

In affirming the I.C.C.'s decision, the District Court agreed with the I.C.C. that a broad reading of the term "undertake . . . to transport" would conflict with other provisions of the Act. In particular, the District Court held that a broad reading would conflict with Section 206(a), 49 U.S.C. §206(a) as amended, which states that no common carrier by motor vehicle "shall engage in any interstate or foreign operation on any public highway" without a certificate of public convenience and necessity. The court noted that freight forwarders do not operate on public highways when they ship goods through independent motor vehicle contractors (30 F. Supp. at 973) and therefore were exempt from certification. Thus freight forwarders did not "undertake . . . to transport" goods when they did not lease or otherwise control the motor vehicles performing the transportation.

98. In summary, we disagree with OTP's contention that freight forwarders were not transportation common carriers "in the ordinary sense of the term." It is our view that freight forwarders were transportation common carriers but, prior to 1950, were not subject to common carrier regulation by the I.C.C. unless they actually controlled the means of transportation.

99. OTP also relies on the theory that brokerage does not require capital investment in facilities, and thus argues that common carriage regulation may depend upon whether the facilities used in the carriage are owned or leased. Under this theory, the assumption of the financial risk entailed by capital investment is an indication that the entity is operating as a common carrier. Compare United States v. Drum, 368 U.S. 370 (1962). If such "own versus lease" examination is relevant in considering the existence of common carriage in the subject proceeding, however, we would also have to consider the type of lease, its duration, the extent to which and on what terms it could be terminated, and similar factors. In its Response Comments, Telenet argues that the resale entities envisioned in this proceeding cannot be easily labeled as to the ownership of their facilities, and that any attempt to base regulation on ownership would be futile. Telenet also notes that "value added" carriers which do lease transmission facilities may in the future own computer-based switching centers or microwave transmission facilities, and that a definition of common carrier which relies on the ownership of facilities will restrict the entities' freedom of technical and economic judgements regarding the satisfaction of their plant requirements.

100. The preceding paragraphs review theories which could suggest that anything but full Title II jurisdiction is appropriate for resale entities. The majority of comments, however, show no hesitancy in urging that a finding of Title II jurisdiction is mandated by MacKay Radio and Telegraph Company, supra. In that case we held that the lease of a telegraph circuit into an area not previously served by the lessee carrier required that we first issue a certificate of convenience and necessity under Section 214 of the Act even though the carrier's use of the leased line was not exclusive. In reaching that decision we looked to the carrier's purpose in extending its service into a new area and to the "far-reaching effects" of a different interpretation of its authority. Because MacKay was conceded to be a common carrier, we did not consider in that proceeding whether such activities by their very nature establish an entity to be a common carrier under the Act; consequently, OTP suggests that we not read MacKay so broadly that we apply common carrier regulation to any "intermediary function." As a technical matter, OTP is correct in arguing that MacKay is not expressly controlling, but as a practical matter we see no reason for retreating from our position that the extension of service to new area by leased facilities requires certification.

101. Inasmuch as we have decided that resellers will be engaged in interstate communication by wire and radio, we now shall determine whether they are common carriers within the meaning of the Act. In doing so, we must re-examine the essential characteristics of common carriage. In the recent NARUC cases cited in footnote 79, supra, the Court of Appeals discusses the essential incidents of common carriage. 80/ The court concluded that "the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking 'to carry for all people indifferently'" 81/ This is not to say that an entity must offer a particular service to the entire public; it is enough that the service is imbued with the public interest and that it be offered indifferently to all the members of a user group interested in obtaining the service. 82/ In Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, 254 (1958), the Commission defined communications common carriage as that activity whereby:

a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who choose to employ such facilities and to compensate the carrier therefore may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and other carriers connecting with it. 83/

Although the foregoing definition is somewhat inaccurate to the extent that it implies that the using public actually transmits intelligence over common carrier facilities, it, nevertheless, is useful because it emphasizes the importance of the offering. We already have described the resale activity, and with the exception that some resellers may not own any transmission plant, we perceive no difference between resale and traditional communications common carriage. The fact that an offeror of an interstate wire and/or radio communication service leases some or all of its facilities -- rather than owning them -- ought not have any regulatory significance 84/ The public neither cares nor inquires

80/ See also, e.g., Propeller Niagara v. Cordes, 21 How. 7, 22 (U.S. 1858), and Stimson Lumber Co. v. Kuykendell, 275 U.S. 207 (1927).

81/ NARUC v. F.C.C., No. 75-1075, p. 10, F. 2d , (D.C. Cir. 1976), footnote omitted.

82/ See Terminal Taxicab Co. v. Katz, 241 U.S. 252, 255 (1927), for the proposition that common carriage does not necessitate carriage for the whole public.

83/ See also Industrial Radiolocation Service, 5 F.C.C. 2d 197, 202 (1966).

84/ In fact, Western Union leases a substantial part of its communications facilities now. It has never been suggested that it is not a common carrier in its offering of services over leased facilities.

whether the offeror owns or leases the facilities. Resellers will be offering a communications service for hire to the public just as the traditional carriers do. The ultimate test is the nature of the offering to the public. No one contends that resellers will make a private offer of communications service rather than a public offering. Nor we will permit resellers to operate in a discriminatory fashion. Accordingly, the offering which resellers will make will satisfy the "sine qua non" of common carrier status, and they will be considered as such. Later experience may show that the public interest would be served by deregulation of resellers. If so, to the extent that the law allows it, we will review the matter and act accordingly.

REGULATION OF RESALE AND SHARING

A. Resale

102. Having determined that the resale of communications service is a common carrier activity within the meaning of the Communications Act, we turn now to the question of how the Commission should regulate entities engaging in resale. In Item of Inquiry 12 of the Notice, we called for comments regarding the most desirable manner of rate regulation, appropriate accounting and financial reporting and the nature of regulation over commencement of operation, standards of service and termination of service. A number of parties made general or specific recommendations in this area, assuming or arguing that resale entities were subject to full regulation under Title II of the Act. With respect to entry requirements, the three certificated resale carriers--Telenet, PCI and Graphnet--all suggest that certification pursuant to Section 214 is required for initiation of service. Graphnet, however, urges that the criteria for grant of a certificate should be flexible when the proposed service is "value added." We have previously (paragraph 18) expressed our view that the term "value added" is too vague to be accorded regulatory significance. If "value added" were to be a criterion in the regulation of resale entities, problems arise if an underlying carrier thereafter offers the service and thus deprives it of its "added value" feature. ^{85/} Accordingly, we will not give any regulatory significance to the existence of "added value" in considering an application for certification pursuant to Section 214.

103. Telenet has argued that entry should not be authorized unless a public need for the service has been shown. This question was among the issues raised by Western Union in RM-2218. Thus, Western Union states that each entity seeking certification as a carrier providing resale service should be required to demonstrate how it will provide a special benefit to the public which is not otherwise available. We are not willing to impose such a requirement. We have previously discussed (paragraphs 75-88) the public benefits to be realized from resale and sharing. It appears from the record in this proceeding that competition in the resale market may be an inherent characteristic, given, inter alia, the apparent absence of a need for substantial investment. It

would be inconsistent with this observation to require that a prospective carrier demonstrate that it will offer a unique service not provided by another certificated carrier. Several factors are significant in this regard. First, we note that the industry characterized by resale carriers operating primarily with leased communications facilities is growing and dynamic in nature. New entities can reasonably be expected to provide communications services not heretofore available, but we recognize that

^{85/} It may also be argued that any resale of communications "adds value" because the user finds it more preferable to take service from the reseller than from the underlying carrier.

these firms may not have yet developed to the point where they can provide a unique offering. It would not be in the public interest to raise a barrier to entry of these firms. Second, the requirement of fulfilling a special need not otherwise available would give undue preference to the already certificated resale carriers, who would be in a favorable position to bar potential competitors. The certificated resellers have repeatedly suggested to the Commission that competition in this area will provide safeguards against excessive rates and profits (see paragraph 113, *infra*).^{86/} If the resale market is to be characterized by a significant degree of competition, it is all the more preferable that entry be relatively open and that no established carrier be given preferred status. Thus, we will not provide a "protective umbrella" to the already certificated carriers. See Specialized Common Carrier Inquiry, 29 F.C.C. 2d 870 (1970). Finally, as we mention in other parts of this Report and Order, the new carriers will not necessarily be constructing their own transmission facilities, so that failure to survive competition will not result in the inefficient or uneconomic utilization of communications facilities.

104. Our determination that certification of a resale carrier need not depend upon a specific showing that there is a public need for the service, nor upon a showing that the service to be offered is unique, is consistent with precedent and applicable legal principles. In the Supreme Court's decision in F.C.C. v. RCA Communications Inc., 346 U.S. 86 (1953), the Court pointed out that in reaching a conclusion that duplicating authorizations are in the public interest wherever competition is considered feasible, the Commission is not required to make specific findings of tangible benefit. It further held (346 U.S. at 97):

In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast [citation omitted], but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it.

In our decision in the Specialized Common Carrier case we concluded that there was sufficient ground for a reasonable expectation that new entry would have some beneficial effects, and we so warranted.

105. We have previously alluded to the need for and desirability of open entry by resale carriers. In our first packet-switched data message service certificate grant for leased facilities, we stated that we

^{86/} Although we in no way abdicate our responsibility to insure that the rates for resale services are just and reasonable, we concur in the observation that the very nature of the market will lessen our direct involvement in their establishment. The natural tendency of the resale market will be to minimize the opportunity for one firm to charge excessive rates. This is especially so where the Communications Act requires that all rates be published and this Commission provides for public comments and protests thereupon.

intended to follow a liberal policy of authorizing such operations. 87/ And we specifically found that the findings and philosophy reflected in our Specialized Common Carriers decision dealing generally with the market for data transmission and other specialized services were relevant and supported a competitive environment for the development and sales of the type of services proposed by PCI. In our grant of a certificate to Graphnet to provide a leased facility, nationwide, computerized, packet switched facsimile communication system, we found over the protest of Western Union that the proposed service was primarily a competitive undertaking which fell under our liberal open entry policy. 88/ The same open entry policy was applied to Telenet's application for a leased facility, packet switched data communications network, over the protest of Western Union, with the acknowledgement that the new packet switched carriers would have an impact upon the structure of the industry. 89/

196. In our action today we are eliminating discrimination in resale, brokerage and shared use of existing facilities. Our action today envisages not only novel and innovative services but also resale proposals and shared use which will consist of divisions of full time private line circuits and derived channels of lesser grade which will enable smaller users to make efficient, discrete use of private line offerings at less cost. In such uses the advantages will be in terms of cost savings and selectivity rather than technical innovation. Such advantages manifestly are also in the public interest. We here warrant, as we did in the Specialized Common Carrier Decision, that the entry of resellers and the expansion of shared use will have beneficial effects and will outweigh any possible detriments. Insofar as the entry of new resellers will duplicate services of existing resellers, we find this fact not to be a barrier where the public interest will be served. Washington Utilities and Transportation Commission v. F.C.C., 513 F. 2d. 1150 (10th Cir. 1975). The public benefits described herein (paragraphs 75 - 88, supra) are convincing evidence of the appropriateness of our policy. 90/

87/ Packet Communications, Inc., supra, 43 F.C.C. 2d. at 925.

88/ Graphnet Systems, Inc., supra, 44 F.C.C. 2d at 801-2.

89/ Telenet Communications Corp., supra, 46 F.C.C. 2d at 681-2.

90/ Our finding herein may be distinguished from the factual situation leading to the decision in Hawaiian Telephone Co. v. F.C.C., 498 F. 2d 771 (D.C. Cir. 1974). The court there held that the Commission could not attempt to equalize competition among competitors at the expense of finding whether the public interest would be served. Here, we first note that the competition will be primarily among the resale carriers, not among the traditional underlying carriers owning the facilities. Moreover, we have set forth the public benefits which are expected to result from resale (see paragraphs 75-88, supra). These benefits flow naturally from the competitive market for resale services, and accordingly we are able to find and warrant that competition for resale services is inherent in and serves the public interest.

107. We have determined that the open entry of resale entities would be in the public interest. We turn now to the question whether, and to what extent, an applicant for certification as a resale carrier should be required to show the economic impact of its entry into the market. 91/ In view of our above determination regarding the nature of the resale market, we are of the opinion that a requirement that economic impact be shown by each applicant is unnecessary and would simply be an artificial barrier to entry. Again, we look to the fact that an applicant will be seeking to enter a market wherein other entities (both resale carriers and to some extent underlying carriers) are providing service in a competitive climate. The record in this proceeding establishes that our action will have only minor economic impact on the underlying carriers, and may in fact result in stimulation of demand for their services and facilities. This issue is one which properly is decided in a broad rulemaking proceeding such as this, where many interested parties have been afforded an opportunity to present their views and comment on the views of others. Likewise, in the Specialized Common Carrier Inquiry, 29 F.C.C. 2d 870 (1971), we resolved broad policy issues and declined to thereafter establish a "multiplicity of proceedings to consider the same contentions over and over again . . ." 29 F.C.C. 2d at 900. In that case, we found that it would be contrary to the public interest to hold comparative hearings on issues of economic exclusivity. 29 F.C.C. 2d at 923. There, as here, there is a general need for the proposed service and here the need may be met without construction of communications facilities. We point out again, however, that all the resale entities initially providing service may not be able to survive the competitive market. We assume, however, that each applicant will have satisfied itself that it can survive.

108. Notwithstanding our decision not to require (a) a showing of a special need for service not now available, (b) a showing that the proposed service "adds value," or (c) an assessment of the economic impact of entry, we will require that applicants seeking certification as common carriers providing resale services establish that they are technically, legally and financially qualified to provide the service which they propose. No party herein advocating regulation of resale under Title II of the Act has suggested that we relax these requirements, and we see no reason to eliminate the need for these findings prior to certification. We fully recognize the right of an interested party to file pleadings relating to applications for certification, and our obligation to consider the arguments raised therein. However, arguments raised with respect to the need for resale service and the anticipated economic impact on existing carriers will be considered in light of the findings which we make in this proceeding.

91/ This question is similar to issue 4 raised by Western Union in RM-2218. In the Notice (paragraph 30), we stated that the issue as it pertained only to Western Union may not be subject to resolution in this proceeding, although parties were invited to comment on the adverse competitive impact, if any, of resale services.

109. Parties have also filed comments regarding the need for certification of resale network reconfiguration, after the carrier has initially been certified. Telenet and PCI, for example, argue that line-by-line certification is neither proper nor required by Section 214 of the Act. They maintain that a carrier should be authorized to provide service to a given geographical area, and should thereafter be permitted to reconfigure its system without prior Commission authorization. Telenet states that other provisions of the Act, such as the tariff filing requirements of Section 203, will insure that a carrier is not departing from the authority granted by its original certification.

110. Although we see some merit in these arguments we believe it more appropriate and consistent with present practice for a reseller to request, in a Section 214 application, authority to lease a specified number of channels of communications. It would also specify the nature of the "channel of communication". The Commission authorization will cover the blanket request, if appropriate, and the reseller may then lease the facilities from any underlying carrier without further Commission action. However, if the reseller's requirements exceeds the number of channels of communications authorized, an additional Section 214 authorization would be required.

111. We also consider in this area the necessity of obtaining a Section 214 authorization for the addition of multiplexing or computer switching equipment. We have recognized that resale carriers may have substantial investment in such equipment even though they do not own any transmission facilities. Telenet argues that the Commission should allow a carrier to supplement its network by adding new points of network access "with a minimum of regulatory involvement," but also states that such network expansion through the establishment of new switching centers should be preceded by a supplemental Section 214 application (Telenet's Comments at 45-8). We point out that the Commission has heretofore required authorization of the addition of multiplexing equipment, because this is a creation of new "lines" or "channels" under Section 214. We see no need to make any exception to this requirement with respect to resale carriers. With respect to switching equipment, we find that the record in this proceeding does not support any change in our present position in this matter. Thus, certification of switching equipment as part of a complete transmission service will not be required.

112. Closely related to the issue of certification to enter into the resale of communications service is the question as to the need for certification of discontinuance of service. Section 214(a) of the Act provides that:

No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience, and necessity will be adversely affected thereby. . .

RCA Globcom, for one, has argued that there should be regular Section 214 authorization for discontinuance of service. In view of the nature of resale carriers, however, it might be argued that a 30 or 60 day notice of discontinuance is appropriate. We have considered the requirements of the statute and the policy considerations suggesting "notice of exit" regulation, and conclude that we will require certification under Section 214 for a resale carrier to discontinue service. This may not be a burdensome procedure in view of the service being offered. ^{92/} To the extent that a customer obtains service through telephone equipment connected either by MTS or private line to the resale carrier's facilities, a change in the reseller's central office equipment or the discontinuance of a reseller's central office may in fact not be an impairment, reduction or discontinuance of service. If a resale carrier does undertake to withdraw the availability of service to a geographical area, we see no reason why this proposed action should be any less subject to the requirements of Section 214 than, for example, the discontinuance of a public telegraph office. In summary, the resale carriers have chosen to enter the arena of common carrier regulation, and they must be subject to the requirements such as exit control.

113. Our foregoing comments regarding the certification requirements to enter and leave the market for resale services is only part of the regulatory scheme which we must consider in this proceeding. At our suggestion (Notice, paragraph 31, Item of Inquiry 12), parties have commented on the nature of the on-going regulation of resale carriers, including manner of rate regulation (if any), accounting and reporting requirements, and standards of service. The three certificated resale carriers argue that there is no need for rate regulation or regulation of the firms' overall profit level, in view of the competitive nature of the market and the pricing restraints inherent in such competition. They argue that the

^{92/} Taking a contrary view, OTP argues (Reply Comments at 43) that certification prior to operation would have a chilling effect on entry because of the threat of regulation and because:

In addition, barriers to entry can easily become barriers to exit. Open exit is a requirement if management errors or misjudgments are not to be ultimately passed on to consumers.

traditional nature of common carrier regulation should not be made applicable in this area. Telenet, for example, maintains that neither rate of return/rate base nor operating ratio regulation is appropriate for the industry. It states that the Commission can later develop rate-making principles for resale carriers based on industry operating experience and data. On the other hand, the underlying carriers generally argue that resale carriers should be subject to traditional regulatory treatment to assure that the competition is fair and that there is no discrimination among customers.

114. Parties advocating regulation of resale carriers do not appear to dispute the need for one type of rate regulation: the prohibition of Section 202(a) against unjust or unreasonable discrimination in charges, practices, regulations, etc. As Telenet notes (Comments at 38), the Act ". . . imposes certain obligations upon all carriers, and upon the Commission, which cannot be shirked merely because the carrier is of the 'resale' or 'value added' type." We agree with this proposition, but believe that it applies equally to the provisions of Section 201(b) of the Act which requires that all charges for communications service be just and reasonable. The parties advocating "loose rate regulation" do not attempt to reconcile their position with the statutory constraints. It is not sufficient to state that the rates for resale services will be just and reasonable because they will be set according to the going market price in a competitive environment. See F.P.C. v. Texaco, Inc., 417 U.S. 380 (1974). Accordingly, we conclude that it is not appropriate for us to adopt a policy whereby the rates and profit levels of resale carriers are allowed to be set at the prevailing market price. However, see our discussion regarding adequate rates of return for new carriers, not providing monopoly services, in a newly developing competitive market. Southern Pacific Communications Co., F.C.C. 2d _____ (FCC 76-578, released June 24, 1976); American Satellite Corp., 55 F.C.C. 2d 1 (1975).

115. It has been suggested by some parties that we adopt "simplified" or "relaxed" tariff filing requirements for resale entities. However, no specific proposals have been presented for our consideration, and we are not aware of any burdensome procedures in our present regulations which would warrant special tariff filing procedures for resale carriers. Thus, we do not make any special provisions in this area.

116. In the Notice, we called for comments on the desirability of setting rates on an operating ratio basis instead of a rate of return/rate base method. We encouraged interested parties to give their views on the most appropriate type of rate regulation, and did not mean to limit comments to the two ratemaking procedures set forth therein. Unfortunately, this subject was given little in-depth discussion by most parties filing comments, including the carriers with substantial experience in ratemaking principles. 93 / Telenet did adduce detailed reasons as to the undesirability

93 / For example, AT&T simply says that resellers should be "regulated in the same manner and to the same degree as the common carrier," including "scrutiny of rates and profits" to assure that there exists no discrimination. AT&T's Comments at 35.

of both ratemaking approaches as applied to resale entities; it urges that the appropriate method of rate regulation (if needed at all) be determined in the future when the operating and economic experience of the resale market can be considered. We will not at this time enter into a discussion of the merits and disadvantages of the two approaches, nor will we make any conclusions as to the most appropriate method of setting rates for resale entities. We believe that there is considerable merit to Telenet's argument that a decision now would be premature. Instead of setting this issue for further comment, however, we have decided to allow the carriers in the first instance to determine the ratemaking approach best suited to their operations, and to present such justification to the Commission at the appropriate time. In the meantime, all carriers will be subject to the Commission's substantive rules for rate filings, including the provisions of Section 61.38 (unless the carrier's revenue level exempts it from the applicability of the regulation). We may in the future find it preferable to consider this question again in the broad context of industry characteristics and economics, but for now it appears preferable to proceed on a case-by-case basis.

117. In the Notice, we did not specifically call for comments on the desirability of establishing quality of service standards applicable to resale carriers. However, this issue has been raised either implicitly or explicitly by a number of parties submitting comments. It has been contended that the resale of communications service is not desirable because, inter alia, the existence of a middleman between the underlying carrier and the ultimate customer may lead to a deterioration of service. The issue arises in two contexts: whether certification should be conditioned upon the provision of certain minimal service standards and whether these standards should be included in the carrier's tariffs. With respect to entry, we have heretofore stated that a showing of technical and financial qualifications must be shown before certification is authorized. We recognize, however, that there may exist a need for low cost/low quality service and we do not rule out the possibility of certification of such service. What we will require is a showing that the applicant in fact can meet the standards which it proposes. With respect to the ongoing operation of a carrier engaged in the resale of communications service, we will not at this time require specific tariff provisions relating to the quality of service. The fears of the carriers that there will be a degradation of service as the result of a middleman appear to be overstated (See our discussion at paragraphs 75-88, supra).

118. Several parties have commented about the applicability of the "maximum separation" principle of our Computer Inquiry, supra, to resale carriers. In the Computer Inquiry, we required that a communications carrier desiring to offer data services (hybrid data processing or remote access data processing) must form a separate corporation to conduct such operations. ^{94/} In its comments, Telenet urges that we make applicable this principle to resale carriers, and CBEMA maintains that there is no reason to reconsider the policy determinations arrived at in the Computer Inquiry.

^{94/} 47 C.F.R. §64.702.

B. Sharing

120. We defined sharing in paragraph 23, supra, as a non-profit arrangement in which several users, perhaps having no community of interest other than to communicate between the same two geographic points or to communicate with each other, collectively use communications services and facilities obtained from an underlying carrier or a resale carrier, with each user paying the communications related costs associated with subscription to and collective use of the communications services and facilities according to its pro rata usage of such communications services and facilities. 96/

A bona fide sharing arrangement exists wherein each participant has a communications need (other than a need to resell the service to others) for the services and facilities being shared. Although the distinction between sharing and resale may not always be clear, we have concluded that sharing, unlike resale, is not common carriage subject to our Title II jurisdiction. 97/ However, once an element of profit enters into an arrangement otherwise characterized as sharing, we will consider whether Title II jurisdiction is required. We base this position not merely upon the presence of profit. Rather, we look to the substantial likelihood of an indiscriminate offering to the public once one snarer seeks to engage in a profit-making activity.

121. Central to the comments regarding unauthorized resale is the argument that there are limitless ways in which profit may be derived from a sharing arrangement. Parties have suggested various means by which such abuse could be detected, and we will discuss these proposals herein. First, we must resolve the threshold question of whether sharing should be allowed only through non-profit intermediaries (see paragraph 25, supra). This is an approach which would probably provide the most comprehensive protection against resale by uncertificated entities, because the operation of an intermediary chartered as and providing service through a non-profit corporate

96/ Although we refer to sharing of costs according to pro rata usage, as does AT&T, we do not herein rule out any other manner of allocation of the costs of the sharing arrangement, so long as one user does not realize a profit from such allocation (other than reduction of its own communications costs).

97/ As noted in paragraph 128, infra, however, we do not believe that we are without jurisdiction of any kind with respect to the sharing of communications service.

entity is prima facie not common carriage "for hire" within the meaning of the Act. Despite the seeming attractiveness of this approach, we do not adopt it. Sharing only through a non-profit intermediary corporation would negate the joint use arrangements presently allowed with respect to some carrier offerings, and it is this type of arrangement which is more likely to benefit a smaller communications user desirous of sharing. Accordingly, we find that sharing may legally and practically be accomplished by direct subscription to the service by a user, even though that user is an individual or a for-profit corporation.

122. In a "pure" sharing arrangement, where a group of users is furnished communications service by an underlying carrier and the users divide the charge according to their relative usage, paying no other charge for the sharing arrangement, there is little opportunity for profit to one member. We anticipate, however, that sharing will be more widely characterized by an individual or a for-profit corporation taking the lead role (either as an intermediary responsible for paying the carrier the entire tariff charge or as a primary user of the service), and providing the other users with other services augmenting the communications service. It is with respect to the legality of this type of arrangement that many parties have spoken. There are a number of possible abuses of such a sharing arrangement, and a number of solutions thereto, presented in this record. Telenet argues that sharing should be allowed only by a certain number of sharers, or, in the alternative, that sharing by more than five members be allowed only upon a formal determination by the Commission as to the legality of the sharing arrangement. In response, ARINC disagrees with a limitation on the number of sharers, and with the "trip wire" approach whereby exceeding a certain number of sharers brings about more complex reporting and "certification" requirements. MCI generally agrees with a "trip wire" approach, and suggests that below the limit, initial and periodic reports must be filed with carriers; above the number, reports would be filed with the Commission. We do not see merit in either limiting sharing to, or requiring different supervision over, a given number of sharers. There is no evidence in this record which would justify our selection of the maximum number of sharers. Moreover, as ARINC points out (Reply Comments at 22), limitation of the number of sharers in an industry-wide sharing arrangement may work to the detriment of smaller members, which could be excluded from a favorable communications system by large members citing Commission limitations on membership limits.

We see no substantial correlation between the number of members of the sharing arrangement and the possibility of unlawful resale disguised as sharing. Accordingly, we do not adopt any limitation on the authorized number of participants in a sharing arrangement. ^{98/}

123. One of the most widely discussed aspects of sharing has been the lawfulness of a management fee imposed on the other users, and the allocation to the other users of charges for "augmenting" the communications service. ^{99/} Herein, argue several parties, lies the disguised profit in sharing arrangements. Telenet states:

Where mere sharing of a line is involved, and none of the sharing parties supplies hardware or software for the purpose of facilitating the sharing arrangement or enhancing the ultimate communications service, the only potential for profit arises out of the possibility that the Customer might allocate to his Joint Users a greater portion of the facilities carrier's charges than justified by their proportional use. However, where the Customer adds to the lines leased from the facilities carrier channelizing or switching equipment, software, or other enhancing features, or undertakes administrative responsibilities on behalf of the Joint Users, a virtually limitless potential for profit arises if the Customer is permitted to charge his Joint Users for a portion of these ancillary costs. (Telenet Comments at 19)

Telenet proposes one solution, not generally shared by other parties — the customer may not charge to any joint user any fee other than a proportion of the carrier's line charge, and the customer's charge must be no less than its proportionate use of the shared facilities. If the carrier billed the users directly, no charge could be collected by any user. If a user desired to collect a fee for the "augmented" services, such as network management, it would have to seek certification as a common carrier. This requirement would limit sharing to the "pure"

^{98/} In view of our decision with respect to reporting requirements, we also reject the suggestion that sharing by a given number of users bring into effect different reporting requirements. See paras. 127-128, infra.

^{99/} As pointed out in paragraph 8 of our Notice, under RCA's Joint User Plan the Joint User would pay RCA a management fee which is computed on the basis of mileage of the network used, number of access points and speed of communication.

sharing arrangement to which we referred in paragraph 122, supra. In view of our conclusion that sharing through a non-profit intermediary is permissible sharing, the suggestion must be rejected. Even as applied to sharing without a non-profit intermediary, we believe that it goes too far in attempting to regulate disguised resale, at the expense of smaller users which need more than "pure" sharing, but for whom association in a non-profit intermediary is not practical. Accordingly, we will permit sharing parties to augment their communications service, sharing the costs of the augmented service on a basis proportionate to their usage.

124. MCI takes the position that a user should not be allowed to charge a management or service fee for its activities in managing the network, but it would allow capital and operating expenses to be pro-rated among the users. Other parties generally state that all costs should be shared on a non-profit basis, either stating or implying that a management fee should be allowed. We have considered all these positions and believe that the imposition of a management fee by one user on other users is inconsistent with the concept of sharing as a non-profit activity. Included in the management fee might be numerous "costs" which are designed to reimburse one user for its entrepreneurship in organizing the arrangement. We recognize that the network management may be required, and accordingly we do not believe it to be inconsistent with non-profit sharing for network management to be provided by an outside entity, so long as no sharer obtains a profit therefrom. For a smaller user arrangement, it might be more advantageous for one user to manage the operation without allocation of any fee, in which case it would be compensated for its efforts simply by sharing the cost of its communications requirements. This is entirely consistent with the rationale of bona fide sharing -- economy -- which weighs the expense of entering into a sharing arrangement against the costs of making that arrangement work. If the user finds that its costs of management exceed the economies derived from the sharing arrangement, it has the option of obtaining outside management services, or abandoning the sharing arrangement as unsuited for its particular needs. As we have noted, there may well be resellers available to provide such a user with service at attractive terms.

125. Although parties did not comment on it to any extent, there is another allocation of expense related to the management fee -- the expense of advertising for users to join in the arrangement. If the true motive for sharing is economy, it is questionable whether extensive advertising, with allocation of the costs thereof to the other users, is in keeping with the definition of sharing as a non-profit arrangement. This is especially true if the publicity is coupled with short term sharing arrangements, in which case the "sharing" begins to take on a characteristic of common carriage -- an indiscriminate offering to the public for profit. See N.A.R.U.C. v. F.C.C., 525 F.2d 630 (D.C. Cir. 1976). We believe that sharing is more aptly characterized by long term arrangements than an invitation to join in a short term joint arrangement. We are not holding that it is impermissible for a sharing arrangement to advertise for additional members, nor do we set a minimum time commitment that each user must respect. We simply set forth our view that there are criteria which have traditionally been looked to in defining common carriage, and thus regulation under Title II of the Act. If we are called upon to rule whether a particular entity is providing resale service or merely sharing, we will not hesitate to make a factual finding regarding whether the offering is being made indiscriminately.

126. It has been suggested by several parties that sharing should be limited to entities in the "same line of business." It is not clear upon what rationale such a requirement could be based, except as a possible deterrent to the existence of resale disguised as sharing. To the extent that such a requirement is thought necessary to conform with the "single customer" provisions, we point out that these exceptions have been found to be unlawfully discriminatory (see Appendix E). We believe that the best policy is to allow a customer to share its facilities with any other entity regardless of their respective lines of business, and that a restriction of sharing to industry-oriented groups -- acting through an intermediary or otherwise -- would be an unreasonable restriction upon the subscriber's use of its service. 100/

127. There remain two final but very important questions with respect to our supervision over sharing arrangements: should prior Commission approval be required (either affirmatively or by failure to disapprove), and to what extent should reporting requirements be required (and to whom)? With respect to the first question, Telenet and MCI suggest that potential sharers -- or at least potential sharers above a threshold -- should give notice to the Commission of their intent to engage in joint use. In the absence of any objection, the arrangement would become effective after a given period of time.

100/ Also, we find unjust and unreasonable, and hence unlawful, the requirement in AT&T's tariff (see para. 33, supra) that authorized users may communicate only with the customer, who is in the same line of business, but not with each other.

Other parties advocating sharing argue that it should be "unregulated" and not subject to "red tape". As to the second question, we have received various proposals for the reporting of sharing arrangements both to the Commission directly and to the carrier. These proposed reporting details and the filing intervals are diverse, as might be expected. ¹⁰¹/ On the other hand, some parties, such as Dow Jones, maintain that any reporting by sharing arrangements would be costly and useless.

128. We have carefully considered these questions, and conclude that it is not now appropriate to require prior notice to or approval of the Commission, nor will we adopt any uniform reporting of finances and operation. We caution, however, that although we have found that sharing is not common carriage subject to the provisions of Title II of the Act, we are not devoid of jurisdiction reasonably ancillary to the effective performance of our responsibilities for the regulation of telecommunications common carriers. United States v. Southwestern Cable Co., 392 U.S. 157 (1968). We recognize that sharing may have a substantial impact upon the activities of the regulated carriers, and perhaps on other regulatory policies which we have adopted. It appears now that the adoption of specific regulations pertaining to the authorization and ongoing supervision of sharing arrangements might be burdensome to a great number of sharers and a barrier to entry to potential sharers, especially smaller entities. Although such reporting requirements may assist in the supervision of unlawful resale in the form of sharing, we are not convinced that this possible benefit outweighs the disadvantages. In the future, if we find that resolution of individual cases regarding improper sharing could be alleviated by reporting, we reserve the right to again consider this matter. We note in this regard that the present tariff provisions allowing joint use do not require notification or reporting to the Commission, and that they have for the most part not led to abuse. To the extent that the lack of notification and reporting of sharing have led to abuse, we believe that the guidelines as to the distinction between resale and sharing set forth herein will obviate the abuses. We stress, however, that we are not making the

¹⁰¹/ Telenet, for example, would require that the carrier whose services are being shared report semi-annually to the Commission with respect to the number of sharers and the charges therefor. Customers would also be required to submit semi-annual reports to the Commission pertaining to the lines leased from carriers, contracts with other customers, the basis for allocation of charges, etc. At the other extreme, the Truckers suggest that the certificated user groups (which it views as extensions of the single customer exceptions) file reports on their activities every five years.

the finding that it would be improper for a carrier to require information from entities desiring to share its services, so long as the carrier requirements do not frustrate the policy which we are adopting herein. We anticipate that we may be presented with complaints that a carrier has refused to provide service to a sharing arrangement because it believes that the arrangement is in fact an uncertificated resale carrier. In such a case, we will resolve the matters according to the facts of the particular situation. Likewise, we may be presented with a complaint that a carrier is furnishing service to an uncertificated reseller which the carrier considers to be a sharing arrangement. Again, we will proceed with consideration of the case on its particular facts. We realize that it might be thought to be preferable to adopt a set of regulations which strictly delineated resale and sharing, but this may not be a realistic approach in view of the difficulty in maintaining a clear distinction between these activities.

129. In summary, we have expressed our view that three forms of sharing may reasonably be anticipated as a result of our decision:

- (a) sharing through a non-profit intermediary;
- (b) "pure" sharing wherein two or more users combine their needs to share only the costs of communications line service; and
- (c) sharing, either through a for-profit intermediary or in an arrangement wherein one user is the primary user, in which line costs and charges associated with "augmented" services are shared according to usage. In this case, no management fee may be charged unless the payment is made to an entity other than a sharing participant.

We have imposed no notification or reporting requirements on the sharing arrangements, except that we recognize the possible need of the carriers to obtain information to determine that the customer proposes to use the service consistent with our policy.

CONCLUSIONS

130. We have determined in this proceeding that unlimited resale and sharing of all services other than monopoly services is just and reasonable, and that tariff provisions which prevent or restrict such practices are unjust and unreasonable, and thus unlawful. Unlimited resale and sharing of private line services are prescribed as just and reasonable. Moreover, we have concluded that the so-called "single customer" provisions found in the carriers' tariffs are unjustly and unreasonably discriminatory, and accordingly unlawful. We find that resale of communications service is a common carrier activity and that entities engaging in resale are fully subject to the provisions of Title II of the Communications Act. Sharing will be allowed consistent with the criteria set forth herein, and we do not at this time require that prior notification or reports be made to the Commission by sharing groups. We do not require the elimination of the restrictions on MTS and WATS.

131. Several parties have filed comments subsequent to the due dates, and have requested that their pleadings be accepted. No objections to these requests were filed, and we find that acceptance and consideration of the comments would be beneficial to our resolution of the issues herein. In view of this fact, we hereby accept all late-filed comments which were properly served on all parties.

132. Accordingly, IT IS ORDERED, That the policies set forth herein are effective immediately, and all common carriers subject to the jurisdiction of the Commission shall file revised tariffs by September 1, 1976 eliminating restrictions on the resale and shared use of their services which are not consistent with these policies. Any motion for stay of the effectiveness of this action shall be filed by August 2, 1976.

133. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION *

Vincent J. Mullins
Secretary

*See attached statements of Commissioners Lee and Hooks.

**Statement of Commissioner Robinson to be issued at a later date.

WESTERN UNION'S PROPOSED ISSUES IN RM 2218

1. Whether as a general policy the public interest would be served by permitting the entry of "value-added" or "pseudo carriers" to compete with the specialized and general purpose carriers.

2. Whether the further fragmentation of the industry which would result from establishment of resale-type services in competition with essential primary services now available from general purpose carriers is in the public interest.

3. Whether the proliferation of "value-added" carriers which will rely on facilities obtained primarily from Bell will promote or restrict competition.

4. What would the impact of competition of the nature provided by "value-added" and "pseudo carriers" be on Western Union's ability to perform its common carrier obligations under the Communications Act.

5. Whether competition of the nature provided by the "value-added" and "pseudo carriers" with the prime services of Western Union is in the public interest.

ITEMS OF INQUIRY

1. What is the justification for the restrictions on resale and third party traffic in the currently effective private line service of AT&T and Western Union?

2. Would the public interest be served by a removal of all restrictions on resale of private line services? What would the effect thereof be on:

- a. AT&T and Western Union: Consider the impact on such factors as facilities fill and planning, traffic volumes revenues, and rate of return for the company as a whole and by affected service or particular route.
- b. The Communications Industry apart from AT&T and Western Union: How would removal of resale restrictions affect the viability of other carriers with their own lines of communication, the stimulation of research and development, the market for new equipment, the development of new carriers, the stimulation of the market for wire and radio communications?
- c. Communications users: Discuss possible new services, new pricing structures, effect on cost of existing services, better communications management and stimulation of the use of the most efficient type of carrier for each type of service.

3. If a total removal of restrictions on resale is not desirable what specific restrictions are recommended? Fully justify any recommended restrictions and discuss in terms of the factors listed in question two.

2.

4. Consider restrictions on resale of other services of AT&T, Western Union and other carriers in the same manner as called for by questions one, two and three above.

5. What is the justification for limiting the sharing of private line services to, generally, voice grade and under services and for requiring those desiring to effectuate a sharing arrangement to have a communications need of their own?

6. Would the public interest be better served by removing all restrictions on the sharing of private line facilities? If that would not be desirable, recommend necessary or desirable restrictions and justify any recommendations taking into consideration the effect of each on the carriers, other elements of the communications industry and the using public.

7. What is the public need for sharing of private line facilities? Discuss any new technologies being developed which would make sharing more attractive, new user applications of sharing and the relationship between the need for sharing and the availability of facilities for resale. Specifically, what need for sharing would remain if all restrictions on the resale of private line facilities were eliminated?

8. What is the need for sharing of other services of AT&T and Western Union as well as the services of any other communications common carrier?

9. What is the justification for provisions of Section 2.2.1 of AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254 which accord special tariff treatment to the airlines, corporate

conglomerates, stock exchanges and their members, and others? Do such tariff provisions, constitute in whole or in part, unjust or unreasonable discrimination, or subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202(a) of the Communications Act?

10. Should the provisions under consideration in question 9 be found to involve unlawful discriminations, what action should the Commission take to remove such unlawfulness? Fully justify any recommended tariff changes and discuss their consistency with any recommended changes with regard to resale and shared use of private line facilities in general.

11. Should the Commission regulate the sharing agreement made between customers and joint users and, if so, to what extent and in what manner? What reports should be required? Specifically consider possible guidelines governing the manner in which the cost of effectuating the sharing arrangement should be shared so that there is a clear distinction between sharing and resale?

12. How should the Commission regulate the entities reselling communications services and facilities? If in some instances full regulation would not be desirable recommend the manner and extent to which regulation is desirable. Specifically consider the most desirable manner of rate regulation for the various types of resale entities. For such entities would the setting of rates on the basis of operating ratios rather than rate base-rate of return be more effective? What accounting system and financial reporting should be required? What regulation over commencement of operation, standards of service and termination of service is desirable?

PARTIES SUBMITTING INITIAL COMMENTS

Aeronautical Radio, Inc. (ARINC)
Air Transport Association of America, Inc. (ATAA)
American Facsimile Systems, Inc. (AFSI)
American Newspaper Publishers Association (ANPA)
American Petroleum Institute (API)
American Satellite Corp. (ASC)
American Telephone and Telegraph Co. (AT&T)
American Trucking Associations, Inc. (ATAI)
Associated Press
Association of American Railroads (AAR).
Bank Wire
Bunker Ramo Corporation
Citicorp
CML Satellite Corp. (CML)
Commodity News Services, Inc. (CNS)
Computer and Business Equipment Manufacturers Ass'n (CBEMA)
Data Transmission Co. (Datran)
Dow Jones
Graphnet Systems, Inc. (Graphnet)
GTE Service Corp. (GTE)
ITT World Communications, Inc. (ITT)
MCI Telecommunications Corp, et al. (MCI)
National Association of Manufacturers (NAM)
National Association of Motor Bus Owners (NAMBO)
National Retail Merchandise Association (NRMA)
North American Telephone Association (NATA)
Orlando Communications Club, Inc. (Orlando)
Packet Communications, Inc. (PCI)
RCA Global Communications, Inc. (RCA Globcom)
Remote Processing Services Section of the Association of Data Processing
Service Organizations, Inc. (RPSS)
Securities Industry Automation Committee (SIAC)
Southern Pacific Communications Co. (SPCC)
Telenet Communications Corporation (Telenet)
Tymshare, Inc.
United System Service, Inc. (USS)
Utilities Telecommunications Council (UTC)
Wells National Services Corporation (Wells)
Western Union Telegraph Co. (Western Union)
Xero-Fax, Inc.

PARTIES SUBMITTING REPLY COMMENTS

Aerospace Industries Association of America, Inc. (AIA)
Altair Airlines
ANPA
AP
ARINC/ATAA
AAR
API
AT&T
ATAI
Bunker Ramo
CBEMA
CITICorp
CNS
DATRAN
Department of Justice (DOJ)
Graphic Scanning Corp.
Graphnet
GTE
ITT
MCI
NAM
NAMBO
NRMA
Office of Telecommunications (OTP)
Orlando
RCA
RPSS
SIAC
SPCC
Telenet
Tymshare
United Press International, Inc. (UPI)
USS
UTC
Western Union
Xero-Fax, Inc.

PARTIES SUBMITTING RESPONSE COMMENTS

ARINC/ATA
AFSI
ANPA/AP/CNS
AT&T
ATAI
Bunker Ramo
CBEMA
Datran
GTE
ITT
MCI
NAMBO
NATA
RCA
RPSS
SIAC
SPCC
Telenet
Tymshare
USS
Wells
Western Union
Xero-Fax

NECESSITY OF EVIDENTIARY HEARING

1. As we determined in the Notice, we have concluded now, after review of all the comments, that the procedures used in this rulemaking proceeding have accorded all parties the procedural rights required under the Communications Act, the Administrative Procedure Act and judicial precedent. However, ARINC and ATA in their joint response comments have argued that before any tariff provision can be found unlawful -- in particular, before their own provision can be found to be unlawfully discriminatory -- Section 205(a) of the Communications Act mandates an evidentiary hearing. ^{1/} ARINC and ATA observe that Section 205(a) was adapted from Section 15(1) of the Interstate Commerce Act (I.C.A.) ^{2/}, and they assert that the latter provision had been construed by the Supreme Court to require an evidentiary hearing by the I.C.C. prior to making a finding that a tariff provision was unlawful. I.C.C. v. Louisville and Nashville

R.R. Co., 227 U.S. 88 (1913). ARINC and ATA further contend that the recent Third Circuit opinion, affirming an interconnection order made by this Commission without an evidentiary hearing, merely interpreted Section 201(a) ^{3/} of the Communications Act as not requiring an evidentiary hearing. Bell Telephone Co. of Pennsylvania and AT&T v. F.C.C., 503 F. 2d 1250 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975). ARINC and ATA argue, therefore, that Bell Telephone

^{1/} 47 U.S.C. §205(a) provides as follows:

Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

^{2/} 49 U.S.C. §15(1).

^{3/} See footnote 9 of Appendix E.

2.

is inapposite since Section 201(a) only requires an "opportunity for hearing" in contrast to the "full opportunity for hearing" required by Section 205(a). Similarly, ARINC and ATA argue that precedents construing Section 1(14) ^{4/} of the I.C.A., from which Section 201(a) of the Communications Act was adopted, are also inapposite. United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 224 (1973); United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973). Although in both decisions the Court held that an evidentiary hearing was not statutorily compelled by Section 1 (14), ARINC and ATA note that the Court did not pass on the question of what type of hearing was required under Section 15(1) of the I.C.A.

2. As we observed in the Notice (paragraph 33), the A.P.A., which governs proceedings before administrative agencies, sets forth two basic procedures for use in agency rulemaking and adjudicatory proceedings. ^{5/} The procedures of Sections 7 and 8 ^{6/} of the A.P.A. apply to agency adjudications and rulemakings in which the rules being considered "are required by statute to be made on the record after opportunity for an agency hearing. ^{7/}" (Emphasis added). The procedures of Sections 4 ^{8/} apply to the so-called "notice and comment" rulemaking proceedings. In the Notice, we stated our belief that "notice and comment" rulemaking proceedings were legally sufficient to accomplish our purposes in Docket 20097. In other recent Commission statements, we have also taken the position that certain hearing provisions under Title II of the Communications Act do not require trial type proceedings. In the Matter of AT&T's High Density-Low Density Structure, 45 F.C.C. 2d 88, 89 (1974); In the Matter of Bell System Tariff Offerings of Local Distribution Facilities For Use By Other Common Carriers, 46 F.C.C. 2d 413, 418-19 (1974) (hereinafter the HiLo order and OCC Interconnection decision, respectively). ARINC and ATA have now called upon us to justify this position with respect to the Section 205(a) hearing provision.

^{4/} 49 U.S.C. 1(14)

^{5/} The A.P.A. defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates . . ." 5 U.S.C. §551(4). "Rulemaking" means "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). An "order" is defined as "the whole or a part of a final disposition . . . of an agency in a matter other than rulemaking." 5 U.S.C. §551(6). Finally the A.P.A. defines "adjudication" as the "agency process for the formulation of an order." 5 U.S.C. §551(7).

^{6/} 5 U.S.C. §§556-57.

^{7/} 5 U.S.C. §553(c).

^{8/} 5 U.S.C. §553.

3.

3. In the OCC Interconnection decision, we stated that, because we were making determinations of policies, procedures and other questions common to a large number of applications, we could proceed by rulemaking procedures different from the Section 7 and 8 procedures. 46 F.C.C. 2d at 418. We specifically cited Section 4(j) of the Communications Act which expressly authorizes us to conduct proceedings "in such a manner as will best conduce to the proper dispatch of business and to the ends of justice".^{9/} In HiLo we stated, without elaboration, that neither the legislative history of Section 204 ^{10/} and 205 nor that of their models in the I.C.A. indicates that trial type proceedings are mandatory. 45 F.C.C. 2d at 89. Finally, in both the Notice and in HiLo we treated the absence of the words "on the record," or words of similar import, as indicative that Section 7 and 8 procedures were not mandatory under the A.P.A. Notice (paragraph 33, note 24); HiLo, 45 F.C.C. 2d at 89. Thus, to recapitulate, we have relied on a number of factors in concluding that trial type rulemaking proceedings are not required under the hearing provisions in Title II. Briefly, these factors are:

1. the presence of general policy questions common to a large number of regulatees;
2. Section 4(j) of the Act requiring that we conduct our proceedings "as will best conduce to the proper dispatch of business and to the ends of justice."
3. our reading of the legislative history of the Communications Act pertinent to the hearing provisions under Title II; and
4. the absence of the words "on the record" in any of the hearing sections under Title II.

^{9/} 47 U.S.C. 154(j).

^{10/} 47 U.S.C. §204 provides in pertinent part as follows:

Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof . . . and after full hearing the Commission may make such order with reference thereto (Emphasis added).

4. We intend to elaborate on each of these factors, but prior to doing so, we note that our present position relative to Section 205(a) may appear to be a shift from an earlier policy of granting full evidentiary hearings in considering the lawfulness of tariff provisions. In particular, we held an evidentiary hearing in the Telpak Sharing case, 23 F.C.C. 2d 670 (1970), before finding the Telpak sharing provisions to be unlawful. After the Second Circuit reversed our prescription of unlimited Telpak sharing and remanded the case to the Commission for further proceedings (American Telephone and Telegraph Co. v. F.C.C., 449 F.2d 439 (2d Cir. 1971)), we specifically declined to make any prescription because to do so, in our opinion, would have unduly prolonged that proceeding and would have been contrary to the public interest. Telpak (Decision and Order on Remand) 31 F.C.C. 2d 674, 675 (1971). Although the Court had not specified the nature of the further proceedings prior to prescription, we construed the Court's decision to mean that a "fuller evidentiary record" was necessary to prescribe unlimited Telpak sharing, and, for the above stated reasons, we chose not to undertake further evidentiary proceedings. This decision was affirmed in National Ass'n of Motor Bus Owners v. F.C.C. 460 F.2d 561 (2d Cir. 1972). We do not view the Second Circuit's reference to evidentiary proceedings in the latter decision as controlling on the type of hearing required by Section 205(a). And for the reasons stated below, we believe that we unnecessarily implied in the Telpak Sharing case that evidentiary proceedings were necessary before the Commission could make a finding of unlawfulness or prescribe under Section 205(a).

5. Of the four factors listed in paragraph 3, supra, the last appears to be the controlling consideration relative to A.P.A. procedural requirements. It is generally recognized that the presence or absence in a statutory hearing provision of the words "on the record," or words of similar import, is a "[virtual] touchstone test of when Section 556 and 557 proceedings are required." Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1250 (D.C. Cir. 1974). See also Allegheny-Ludlum Steel Corp., supra; Florida East Coast Ry. Co., supra;

Bell Telephone Co. of Pennsylvania, supra. As a corollary, the statutory phrase "opportunity for hearing" or similar phrases do not trigger Sections 556 and 557 of the APA. Bell Telephone Co. of Pa., supra, 503 F.2d at 1264. As already noted (paragraph 1), ARINC and AT&T argue that these cases are inapposite because they merely construe the phrase "opportunity for hearing" and do not pass on the phrase "full opportunity for hearing" contained in Section 205(a) of the Communications Act, and whether the word "full" triggers the evidentiary hearing requirements of Sections 556 and 557 of the A.P.A. We are not convinced by the statutory argument proffered by ARINC and ATA. The F.P.C. has confronted the same issue and

reached the same conclusion as this Commission does now. The Natural Gas Act 11/ requires the F.P.C. to conduct "full hearings" with respect to the filing of initial rates by new natural gas companies under Section 4(e) 12/, but merely requires a "hearing" when the F.P.C. investigates rates of existing natural gas companies under Section 5(a) 13/. The F.P.C. has construed both hearing requirements as virtually equivalent in that both are satisfied by informal rule-making procedures. Re Area Rate Proceeding for Appalachian and Illinois Basins, 44 F.P.C. 1121, 86 P.U.R. 3d 16 (1970). The authority to proceed other than by oral evidentiary hearings under the "full hearing" provision of Section 4(e) has been sustained in American Public Gas Ass'n v. F.P.C., 498 F. 2d 718, 722 (D.C. Cir. 1974). Moreover, administrative agencies should tailor their proceedings to fit the issues under consideration. City of Chicago v. F.P.C., 458 F. 2d 731 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972). The issues under consideration in Docket 20097 are predominantly policy questions. We note that although Section 214(d) 14/ requires a "full opportunity for hearing" in certain instances prior to finding that new or additional carrier facilities would serve the public convenience and necessity, the Commission's grant of certificates upon policy determinations reached without an evidentiary hearing has received judicial approval. Washington Utilities & Transportation Commission v. F.C.C., 513 F. 2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975). In the Specialized Common Carrier Inquiry, interested parties were allowed to submit comments and reply comments, to engage in oral argument before the Commission, and to submit rebuttal comments to oral argument. 29 F.C.C. 2d at 879. In sum, judicial approval of both the F.P.C. procedures in American Public Gas Ass'n, supra, and our own procedures in Washington Utilities & Transportation Commission, supra, leads us to conclude that the presence of the word "full" in Section 205(a) does not trigger Section 7 and 8 procedures. While statutory language other than "on the record" may trigger the procedures of these sections (Allegheny-Ludlum Steel Corp., supra, 406 U.S. at 757), the Supreme Court held in United States v. Florida East Coast Ry. Co., supra, that the term "on the record":

11/ 15 U.S.C. §§717 et seq.

12/ 15 U.S.C. §717c(e).

13/ 15 U.S.C. §717d(a).

14/ 15 U.S.C. §214(d) provides in pertinent part:

The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to (Footnote continued on next page).

5a.

... is, however, the language which Congress used, and since there are statutes on the books that do use these very words . . . adherence to that language cannot be said to render the provision nugatory or ineffectual. 410 U.S. at 237-8.

The Court further held that the term "hearing" in the A.P.A. "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witness, or the right to present oral argument to the agency's decisionmaker." 410 U.S. at 240. The authority to proceed informally thus exists even though the proceeding may be held pursuant to 5 U.S.C. §556(d). 410 U.S. 241

14/ (Continued)

such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity. . . (Emphasis added)

6. Even though we have concluded that the language in Section 205(a) of the Communications Act does not mandate an evidentiary hearing, under the A.P.A., we are still obliged to examine the entire Communications Act and its legislative history to ascertain the congressional intent with respect to the hearing provisions of the Act. Florida East Coast Ry. Co., supra, 410 U.S. at 238-42; Phillips Petroleum Co., supra, 475 F. 2d at 851 (Congressional intent as contained in the specific statute is a "more reliable test" than statutory language); Mobil Oil Corp., supra, 483 F. 2d at 1251. As we have noted, the Communications Act of 1934 was largely modeled on the I.C.A., apparently to take advantage of the established body of law construing the latter statute. ^{15/} The Senate Report to the 1934 bill which ultimately became the Communications Act of 1934 stated that judicial review standards applicable to I.C.C. orders would also apply to F.C.C. orders and that this Commission's findings of fact would be set aside by the courts: "only where the Commission's action has been arbitrary or has transcended the legitimate bounds of the Commission's authority." Louisville and Nashville R.R. Co., supra, was cited for this proposition. As already stated (paragraph 1), ARINC and ATA argued that the Supreme Court in Louisville and Nashville R.R. Co. construed Section 15(1) of the I.C.A. as mandating an evidentiary hearing. Therefore, both parties conclude that Section 205(a) of the Communications Act requires an evidentiary hearing as well because it was adopted from Section 15(1). We disagree with both parties' reading of the Supreme Court's decision in Louisville and Nashville R.R. Co. We construe the Court's statements with respect to the requirement for an evidentiary hearing (227 U.S. at 91, 93) as a requirement imposed by due process of law and not as a statutory mandate under Section 15(1) of the ICA. We are not alone in taking this view of Louisville and Nashville R.R. Co. In Florida East Coast Ry. Co., supra, the Supreme Court characterized the above case as one of a group of cases which:

expressly speak in constitutional terms, while others are less than clear as to whether they depend upon the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution, or upon generalized principles of administrative law formulated prior to the adoption of the Administrative Procedure Act. 410 U.S. at 242 .

^{15/} See Senate Report No. 781, 73rd. Congress, 2d Session, 3-5.

7.

In its discussion of the Louisville and Nashville R.R. Co. case, the Court viewed the situation as one where the I.C.C. was acting in a "quasi-judicial" capacity because complaints from shippers had been filed with the I.C.C. alleging that a particular railroad's rates were unlawful. 410 U.S. at 243. This distinction is important and will be considered below. Because the I.C.C. was acting in a "quasi-judicial" capacity, we do not view the case as holding that Section 15(1) of the I.C.A. per se mandates an evidentiary hearing. ^{16/} Thus, we conclude that the legislative history of the Communications Act does not support ARINC's and ATA's position that Section 205(a) of the Communications Act mandates an evidentiary hearing.

7. We earlier stated that Section 4(j) of the Communications Act provides further support for our position that we may resolve the issues in this proceeding without an evidentiary hearing (paragraph 3, supra). Section 4(i) is also pertinent in this regard, and provides that the Commission may:

perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

With respect to Section 4(j), the Supreme Court held in F.C.C. v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949) that:

. . . Congress was mindful not only of the ends of justice but also of the proper dispatch of the Commission's business, a matter not unrelated to achieving the ends of justice, and left largely to its judgment the determination of the manner of the manner of conducting its business which would most fairly and reasonably accomodate those ends. 337 U.S. at 282.

In that case, the Court relied in part on Section 4(j) in upholding a Commission decision which was reached only on the basis of written pleadings.. Although the applicable statute allowed the party "reasonable opportunity to show cause" why certain action should not be taken, the Commission was held to have "broad discretion" to conclude pursuant to Section 4(j) that oral argument in that case was not required. We also note that the Natural Gas Act ^{17/} confers upon the F.P.C. certain authority to fashion its procedures to accomplish its statutory functions, as do

^{16/} We note in passing that the Court of Appeals in Phillips Petroleum Co., supra, characterized Louisville & Nashville R.R. Co. as "a pre-Administrative Procedure Act case which is fully out of harmony with that statute". 475 F. 2d 842, 849, n. 7.

^{17/} Note 11, supra.

Sections 4(i) and (j) of the Communications Act. In Phillips Petroleum Co., supra, the Court of Appeals held that this language gave the F.P.C. a "broad authority" in determining the form of the hearing required by statute. Although we recognize that Sections 4(i) and (j) must not be treated as conferring carte blanche authority upon this Commission, Mobil Oil Corp., supra, and that Sections 4(i) and (j) would not be sufficient to dispense with an evidentiary hearing if Section 205(a) were interpreted to require it, we believe that the instant proceeding is one in which these sections provide additional support for proceeding informally. Pre-established procedures coupled with limited staff resources have placed great stress upon the Commission's ability to carry out its substantive objectives. Nader v. F.C.C., 520 F. 2d 182 (D.C. Cir. 1975). Consequently, we believe that "notice and comment" rulemaking is not only appropriate for resolution of many issues presented by the Items of Inquiry, MCI and Western Union in this proceeding, but is also necessary to carry out the substantive provisions of Titles I and II with reasonable effectiveness. See Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

8. We noted in paragraph 3, supra, that the I.C.C. in Louisville & Nashville R.R. Co. was acting in a "quasi-judicial" capacity, and that this led to the requirement therein that an evidentiary hearing be held. In our examination of the single customer provisions, we would be remiss if we failed to note some similarity between the complaints against the special rates accorded to present AT&T "single customers" and the New Orleans Board of Trade's complaint against the Louisville and Nashville Railroad with respect to certain transportation rates for shipments from New Orleans to certain other cities. In both instances, there is and was an absence of general policy questions common to a large number of regulatees. In Louisville & Nashville R.R. Co., supra, there was a complaint against rates set by one railroad; in this proceeding, there is a complaint against preferential rates set by two carriers for a limited number of user groups. Consistent with the Supreme Court's reading of Louisville & Nashville R.R. Co. in Florida East Coast Ry. Co. supra, we will assume, arguendo, that certain questions presented by the single customer provisions are "quasi-judicial" in nature 18/.

18/ We do not believe, however, that this proceeding is "quasi-judicial" as it pertains to the single customer provisions. In Florida East Coast Ry. Co., supra, the Court recognized the distinction between "proceedings for the purpose of promulgating policy-type rules or standards" and those "designed to adjudicate particular facts." 410 U.S. at 245. The former proceedings are "quasi-legislative" and appear to be more similar to the instant proceeding than are the latter.

In order to resolve the complaint concerning the single customer provisions, we accordingly will determine whether ARINC and the other single customers have been granted due process in an evaluation of the single customer provisions.

9. Congress envisioned Sections 4, 7, and 8 of the A.P.A. as providing the "outer boundaries" of administrative procedures. Mobil Oil Corp., supra, 483 F. 2d at 1253. Therefore, it is unlikely that anything more stringent than the procedures of Sections 7 and 8 would ever be required to satisfy the due process clause in the Fifth Amendment when an agency acts in a quasi-judicial capacity. We accordingly look to Section 7 to determine whether a full evidentiary hearing would be required before we decide the Section 202(a) issue with respect to each single customer provision. As we stated above, the Supreme Court has specifically recognized that Section 7 does not mandate in every case anything more than an evidentiary submission in written form. Florida East Coast Ry. Co., 410 U.S. at 241. Section 7 provides:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rulemaking . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (Emphasis added).

Courts have previously considered this section when confronted with a party's claim that it was denied due process. There must first be "a specific proffer by petitioners as to the subjects they believed required oral hearings, and what kind of facts they proposed to adduce . . . and as to particular lines of cross-examination . . . they propose to pursue." American Airlines, Inc. v. C.A.B., 359 F. 2d 624, 633 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966). See also Long Island R.R. v. United States, 318 F. Supp. 490, 499 (E.D. N.Y. 1970). The petitioner must show that adjudicatory procedures in the agency's resolution of the issues would have made a difference in the agency's decision to resolve issues either by informal rulemaking or adjudicatory procedures. Upjohn Co. v. Finch, 422 F. 2d 944, 955 (6th Cir. 1970); Siegel v. A.E.C., 400 F. 2d 778, 782, 784-85 (D.C. Cir. 1968); American Public Gas Association, supra, 498 F. 2d at 723. Moreover, there must be a question of fact involved, not merely questions of law or policy. ARINC and ATA do not show what difference adjudicatory procedures would make in this case if oral hearings were held on the lawfulness of the single customer, nor do they meet the other criteria set forth in American Airlines, Inc.

Finally, these parties have had an opportunity in Docket No. 18128 to present their cases in evidentiary hearings, and have referred to their presentation in that case to support their position in this proceeding. See Appendix E, wherein these presentations are considered. It is therefore impossible to conclude that they have been denied due process.

SINGLE CUSTOMER PROVISIONS

1. As we stated in the Notice (paragraph 13), certain tariff provisions which are found at Section 2.2.1 of the private line tariffs of both AT&T and Western Union permit a limited class of subscribers to order communications services for users having a specified relationship to the subscriber. These are the so-called single customer provisions. 1/ Because Western Union's single customer provisions roughly parallel those of AT&T, we will focus our discussion on AT&T's single customer provisions 2/. We have previously made reference to one such provision, Section 2.2.1(E), which allows an organized stock or commodity exchange to order services:

for the transmission of communications to
or from an exchange member located on the
floor of such exchange and relating directly
to the business of the member.

In effect, the stock or commodity exchange functions as an intermediary between exchange members and AT&T. Therefore, Section 2.2.1(E) represents an exception to the resale and third party traffic prohibition found at Section 2.2.3. Curiously, AT&T fails to include Section 2.2.1(E) as an express exception to its prohibition on resale and third party traffic with the other exceptions expressly included in Section 2.2.3. These latter exceptions are Sections 2.2.1(F), 2.2.1(G), 2.2.1(H) and 2.2.1(J). Section 2.2.1(G) permits ARINC to subscribe to AT&T's private line services "for the transmission of communications to, from, within and between air carriers 3/." Section 2.2.1(H) allows the United States Postal Service to subscribe to service "for its use in the provision of its Facsimile Mail Service." Section 2.2.1(J) allows a composite data service vendor (CDSV) to subscribe to service "for the transmission of switched data (non-voice) communications for its patrons when such communications relate directly to the business of such patrons." Finally, Section

1/ AT&T Tariff F.C.C. No. 260, Sections 2.2.1(C)-(J). Western Union Tariff F.C.C. No. 254, Sections 2.2.1(D)-(G).

2/ Throughout the discussion of single customer provisions, the term "private line tariff" only refers to AT&T Tariff F.C.C. No. 260. Other AT&T private line tariffs -- Nos. 267-268 -- do not contain single customer provisions.

3/ To qualify as a subscriber for the air carriers collectively, Section 2.2.1(G) requires that the subscribing entity be an "aeronautical communications company licensed under The Aviation Services rules of the Commission [47 C.F.R. §§ 87.1 ff] to operate stations in the aeronautical mobile and fixed services." ARINC holds such licenses.

2.2.1(F), the so-called power pool provision, is denoted in Section 2.2.3 as an exception to the resale and third party traffic prohibition even though no intermediary is mentioned as the "customer" within that Section. All other single customer provisions identify the customer and the scope of resale activity which can be undertaken by the customer. In contrast to these other provisions, Section 2.2.1(F) focuses only on the user group's identity, stating that private line service is available:

where the use of the service relates to coordination or exchange of electrical pooled power, for the transmission of communications between any two or more stations of such services or similar services furnished to others who are parties to the coordinating or exchange arrangement.

There are three other single customer provisions, but none is expressly recognized in AT&T's private line tariffs as an exception to the resale and third party traffic prohibitions. These include the so-called corporate conglomerate provision, Section 2.2.1(C), whereby a customer can subscribe to private line service for a subsidiary corporation over which the customer exercises 50% control of the voting stock "for the transmission of communications relating directly to the subsidiary's business." 3a/ The final two single customer provisions in AT&T's private line tariff relate to official governmental communications. Section 2.2.1(D) allows a federal department or agency to subscribe to private line services "for the transmission of communications to or from any station on a service furnished" to that department or agency when the head, or duly authorized representative, of such department or agency notifies AT&T in writing that use of the service "is intended only for official United States Government business." Section 2.2.2(I) allows the United States Government "pursuant to the Intergovernmental Cooperation Act of 1968"4/ to subscribe to private line services "for the transmission of communications of a state or local government agency." 5/ We also consider the government single customer provisions to be exceptions to the resale prohibition even though AT&T's private line tariff nowhere states that these are exceptions.

2 While many of the so-called single customer provisions can be viewed as exceptions to the resale and third party traffic prohibition in AT&T's private line tariff, they may simultaneously be viewed as

3a/ We do not find this "corporate conglomerate" provision to be unlawfully discriminatory.

4/ Intergovernmental Cooperation Act of 1968, 82 Stat 1098-1107 (1968), 42 U.S.C. § 4201 ff.

5/ As already stated, Western Union's private line tariff contains single customer provisions which roughly parallel AT&T's single customer provisions. However, Western Union's tariff does not contain single customer provisions for the electric power pools, the United States Postal Service, state or local governments, and CDSVs.

exceptions to the shared use restrictions on AT&T's private line services, specifically the prohibition on sharing of services provided over discrete wideband facilities and the virtual prohibition on sharing of Series 5000 (Telpak) service. In many instances the intermediary is collectively owned in some manner 6/ by some or all members of the user group, and therefore may be considered non-profit. 7/ A user group obtaining private line service through an intermediary owned in some manner by the user group may be viewed as engaging in a sharing arrangement through an intermediary. As we stated in paragraph 25 of the text, a primary advantage of sharing through an intermediary is that it allows specified user groups--such as the airlines, stock exchange members, and electric power pools--to enjoy the administrative convenience resulting from the purchase of communications services in conjunction with other members of the user group. And we also observed in the Notice (paragraph 13) a further advantage to single customer status: it allows user groups who are accorded such status by AT&T to aggregate their communications needs--both as to communications among group members and as to communications within a single member's operation--thereby making the purchase of Series 5000 services economically feasible. Thus, certain user groups, because of their single customer status, are allowed to order communications services under Telpak discount rates, which would not be available to the users taken singly. 8/

3. Because other user groups, including the Truckers, have been denied single customer status and therefore were unable to take advantage of the Telpak discount rates, we initiated an investigation in Docket 19746 to determine whether such exemptions for specified user groups constituted unjust and unreasonable discrimination within the meaning of Section 202(a) of the Act. As we stated at paragraph 12 of the text, because the single customer provisions were, in effect, exceptions to the resale and shared use restrictions we incorporated the issues raised in Docket 19746 into this proceeding. More specifically, Items on Inquiry 9 and 10 (see Appendix B) raised the same issues that were under investigation in Docket 19746. Briefly, Item of Inquiry 9 questioned whether AT&T's and Western Union's single customer provisions are unlawfully discriminatory.

6/ For example, ARINC is incorporated under the laws of the State of Delaware. In its Comments (pp. 4-5), ARINC stated that 99% of its stock is held by trust, regional, commuter and United States and foreign flag air carriers while the remaining 1% is owned by general aviation, non-carrier interests. SIAC is a wholly owned subsidiary of the New York Stock Exchange.

7/ As already stated in our discussion of bona fide sharing arrangements (paras. 23-26 of the text), there are numerous potentials for such arrangements to become profit-making resale ventures for some person or entity. To that extent, our statement in the text must be qualified.

8/ CDSVs are the only single customers precluded by the AT&T private line tariff from ordering Telpak service. Section 3.2.5(A).

4.

4. Several parties contend that the single customer provisions do not present any issue of unlawful discrimination under Section 202(a). ARINC argues that unlawful discrimination cannot arise from the affirmative provision of any service, including Telpak, by the carriers to present single customers. ARINC asserts that it had made a "reasonable request" for service and, therefore, under Section 201(a) of the Communications Act 9/ the carriers were obligated to furnish the requested service. ARINC bases the reasonableness of its request upon the Commission's 1937 finding that "a rapid, efficient, dependable, coordinated system of communications is necessary at all times for the safety of the airlines on the airways" Aeronautical Radio, Inc., v. AT&T, 4 F.C.C. 155 (1937) (hereinafter ARINC case) and the fact that ARINC had provided the airlines with a coordinated communications system for over 45 years. ARINC further asserts that the Commission's 1937 finding is still valid today. As a corollary to its argument premised on Section 201(a), ARINC states that its right to service is independent of any carrier tariff provisions. In sum, ARINC concludes that the single customer issue, properly framed, is whether there had been any improper refusal by the carriers to honor meritorious requests for single customer status made by other entities proposing to serve the inter-member and intra-member communications requirements of certain user groups. To buttress its argument, ARINC cites

9/ 47 U.S.C. §201(a) provides in pertinent part as follows:

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."

precedents from both the I.C.A. and the Communications Act. ¹⁰ The precedents under the I.C.A. dealt with Section 1(4) from which Section 201(a) of the Communications Act was adopted. ¹¹ ARINC next observes that we had expressly stated that rates were not at issue in this proceeding. ¹² Therefore, ARINC reasons that it would become meaningless

¹⁰ ARINC cites the following court and agency decisions which construed the carrier's duty to serve under the I.C.A.:

American Trucking Assn's v. Acheson T.&S.F. Ry., 387 U.S. 397, 406 (1967); Brotherhood of Ry. & S.S. Clerks v. Florida E.C. Ry., 384 U.S. 238, 245 (1966); Menasha Paper Co. v. Chicago & N. Ry. Co., 241 U.S. 55, 58 (1916); Chicago R.I. & P. Ry. v. Hardwick Farmers Elev. Co., 226 U.S. 426, 434 (1912); Hannibal & St. J.R.R. v. Swift, 79 U.S. 262, 270 (1871); N. J. Steam Nav. Co. v. Merchants Bank, 47 U.S. 344, 381 (1848); Johnson v. Chicago, M St. P&P Ry., 400 F. 2d 968, 971 (9th Cir. 1968); Montgomery Ward & Co. v. Northern Pac. Term. Co., 128 F. Supp. 475, 490 (D. Ore. 1953); Lucking v. Detroit & Cleveland Nav. Co., 273 F. Supp. 677, 583 (E.D. Mich. 1921); aff'd 284 F. 497 (6th Cir. 1922), aff'd 265 U.S. 346 (1924); C.O.D. and Freight-Collect Shipments, 343 ICC 692, 760 (1974); and Northern Pac. Ry. Discontinuance of Trains, 333 ICC 15, 39 (1968).

ARINC also cites the following court and agency decisions which construed the carrier's duty to serve under the Communications Act:

MCI Communications Corp. v. American Tel & Tel Co., 369 F. Supp 1004, 1022 (E.D. Pa. 1973), vacated and remanded on other grounds, 496 F. 2d 214 (3rd Cir. 1974); Chastain v. AT&T, 43 F.C.C. 2d 1079, 1084 (1973), petition for reconsideration denied, 49 F.C.C. 2d 749 (1974); Johnson v. Southwestern Bell, 18 F.C.C. 2d 679 (1969); KOTA Cable T.V. Co. v. Minnesota Microwave, 26 F.C.C. 2d 16 (1970).

¹¹ 49 U.S.C. §1(4), as amended (1970).

¹² Resale and Shared Use of Common Services, 48 F.C.C.2d 1077 (1974).

6.

to equate "customer" status with special rate treatment. SIAC takes a similar position to that of ARINC with respect to Section 201(a). In addition, SIAC argues that single customer status should be distinguished from resale and sharing arrangements, which presumably would include TELPAK sharing arrangements. As opposed to these latter arrangements where there is no community of interest between sharers or between resellers and users, SIAC contends that there is a community of interest between the single customer and those partaking in the use of its communication services. SIAC argues that this distinction based upon affinity between users and the single customer bears legal significance. SIAC contends that Section 201(a) requires a carrier to serve entities having this affinity with users whereas carrier restrictions against resale and sharing are subject to a broader test of reasonableness under Section 201(b) of the Communications Act. SIAC cites no cases in support of this legal proposition. As did ARINC, SIAC argues that rates are not at issue in this proceeding.

5. At the outset, we would point out that single customer status cannot be separated from the rate advantages accruing to an entity or group accorded this status. Members of single customer user groups enjoy the discount by being able to aggregate their communications needs and thus justify subscribing to Telpak, which is priced lower than a like (or smaller) quantity of private line circuits ordered separately. Nor can we accept ARINC's and SIAC's implicit view that Section 201(a) is independent of Section 202(a) if provision of that service would place a carrier in violation of Section 202(a)'s proscription against unjust or unreasonable discrimination. We take notice that in ARINC, supra, ARINC brought its complaint against AT&T on several grounds, including (1) AT&T's refusal to render to ARINC private line teletypewriter service for the use and benefit of the aviation industry, and (2) AT&T's refusal to provide such service to ARINC at press rates which were lower than the regular commercial rates on private line teletypewriter service. 4 F.C.C. at 156. Although we held that ARINC would be entitled to the private line

teletypewriter service once it had reasonably requested such service from AT&T ^{13/}, we also held that it was not unreasonably or unjustly discriminatory against ARINC for AT&T to refuse to provide this service to ARINC at the lower press rates. 4 F.C.C. at 167. In short, we found ARINC's request for private line teletypewriter service at press rates to be "unreasonable" under Section 201(a) because it would be "unjustly or unreasonably" discriminatory under Section 202(a). Based on the 1937 ARINC precedent, we believe that single customer status, insofar as it accords preferential rate treatment to several user groups, does present questions of unjust or unreasonable discrimination under Section 202(a). ^{14/} Moreover, we find no precedents under the Communication Act or the I.C.A. supporting SIAC's view that the reasonableness test under Section 201(a) is narrower than the reasonableness test under Section 201(b). And judicial construction of the I.C.A. provision from which Section 201(b) was adopted indicates a relationship between that provision and the anti-discrimination provisions of the I.C.A. ^{15/} I.C.C. v. Baltimore and Ohio R.R. Co., 145 U.S. 263, 277 (1892). ^{16/}

^{13/} In the ARINC case, the record was unclear as to whether ARINC had actually requested private line teletypewriter service from AT&T. 4 F.C.C. at 166.

^{14/} In 1937, the Commercial rates for private line teletypewriter service were \$36 per mile per annum for 60 speed service for 24 hours a day whereas the press rates for the same service were \$30 per mile per annum. 4 F.C.C. at 161. Thus, ARINC was merely seeking a rate preference of \$6 per annum for each private line ordered. Today, the rate preference accorded to ARINC is considerably larger.

^{15/} 49 U.S.C. §§2, 3(1).

^{16/} SIAC additionally contends that there is no Section 202(a) issue raised by SIAC's single customer status as to Telpak because, according to SIAC, it does not avail itself of the Western Union or AT&T single customer provisions for organized stock exchanges. SIAC maintains that AT&T and Western Union (also MCI and RCA Globcom) recognize SIAC as a "customer" under Section 2.5 of their private line tariffs, and that SIAC is merely providing service to stock exchange members pursuant to these carriers' "authorized use" provisions. AT&T Tariff F.C.C. No. 260, Section 2.2.1(B); Western Union Tariff F.C.C. No. 254, Sections 2.2.1(B), (C). Even if SIAC has properly relied upon tariff sections other than the single customer provisions, this provides SIAC with no absolute right to preferential rate treatment. Whether such preferential rate treatment is justified depends upon Section 202(a) of the Communications Act, and not on any carrier tariff provision. Telpak Sharing case, 23 F.C.C. 2d 606 (1970).

8.

6. Because of the extended discussion involved, we have set out in Appendix D the basis for our conclusion that the parties have been accorded the procedural rights required under the Communications Act, the Administrative Procedure Act and judicial precedent. We now turn to the specific reasons set forth as justification for ARINC's discriminatory rate treatment. ARINC asserts that market conditions alone -- that is, competitive necessity -- justifies its recognition as a single customer entitled to receive the TELPAK offering. In support thereof, ARINC cites: (1) the record in Docket 18128; (2) ARINC's current experience as a private microwave licensee for the air transport industry, and (3) Commission statements made in the TELPAK Sharing Case. ARINC contends that the above record clearly establishes that an ARINC nationwide microwave system would be a realistic alternative in the event that ARINC lost its ability to obtain private line services for the airlines at TELPAK rates. ARINC and ATA cite AT&T Exhibit 1, pp. 15-20; ATA Exhibit 4, pp. 22-23; and ARINC's own initial comments, pp. 41-45 (describing ARINC's private microwave experience and its consideration of competitive alternatives to AT&T and Western Union services). We note the ARINC was the only single customer to argue that its status was justified by competitive necessity. Neither AT&T nor Western Union, from whom ARINC obtains private line services at bulk rates, sought to justify ARINC's status on this ground. AT&T

relied on public policy to justify ARINC's status and Western Union chose not to comment on the single customer issue.

7. The Telpak Sharing case, supra, 23 F.C.C. 2d at 613, sets forth the criteria which must be met if a discriminatory rate or preference is to be justified as necessary to meet competition.

ARINC and ATA are the sole possessors of the information which would dispose of the first criterion. In this proceeding ARINC and ATA have maintained that their substitute source of communications service is a nationwide private microwave system and that the airlines will shift to private microwave if ARINC loses its single customer status. Because ARINC and ATA are the sole possessors of the information which would prove these "exceptional facts," they carry the burden of proof with respect to the first criterion. Copley Press, Inc. v. F.C.C., 444 F. 2d 984, 988-89 (D.C. Cir. 1971).

8. An analysis of the material submitted in this proceeding and in Docket 18128 by ARINC fails to convince us that ARINC's single customer status is justified on the basis of competitive necessity. The evidence adduced by ARINC lacks in critical respects the degree of definiteness and commitment needed to justify its preferential position. ARINC has been investigating the feasibility of a private microwave system for the airlines for approximately twenty years. To date, however, ARINC never has introduced into the record evidence that: (a) its board of directors has authorized the construction of a nationwide private microwave system; (b) it has a contractual commitment from any financial institution to supply it funds at specific terms for the construction of a private microwave system; and (c) its member airlines endorse the construction of a system and are committed to purchasing service from such a system. The submission of studies showing the cost of a complete private microwave system for the airline industry and repeated assertions that the industry will switch to a private microwave system if its costs for communications service from common carriers increase are not adequate in themselves to satisfy the first criterion of our competitive necessity showing. The accuracy of ARINC's study is questionable.

We note that: (a) the cost data consists only of "ball park" figures, i.e., very preliminary estimates; (b) they contain no hard survey or cost information for the actual microwave station sites; and (c) they pay little attention to frequency congestion problems extant in some areas. The actual merit of these studies, thus, is questionable. Moreover, we believe that we can state without equivocation that the mere theoretical feasibility of a private system does not establish the actuality of such an alternative, nor does it prove that ARINC's membership would opt to participate in a private microwave system even if such a system was a real alternative to common carrier service. Thus, ARINC's preferential single customer status is not justified of the basis of competitive necessity.¹⁷

¹⁷ After the record in Docket No. 20097 was closed, ARINC announced its plans to upgrade and improve its private line intercity network. However, ARINC did not move to supplement its comments in this proceeding to show how any changes would affect its claim to preferential rate treatment due to competitive necessity.

9. ARINC and ATA might have made a supplemental showing to the one which they made in Docket 18128 indicating the actual microwave station sites selected to provide their nationwide private microwave system, a reasonably exact estimate of the cost of building such a private microwave system, and an explanation of how they planned to deal with the frequency congestion problems in some areas. Neither ARINC nor ATA made such a supplemental showing. Nor did they submit or request the statements of various airlines' personnel who could provide such information. As previously noted, Section 7 of the Administrative Procedure Act accords a party the right "to conduct such cross-examination as may be required for a full and true disclosure of the facts." ARINC and ATA have failed to demonstrate that cross examination was required for a full disclosure of the facts or that they would, in some manner, be prejudiced by the denial of an evidentiary proceeding. Rather, they have relied on a blanket assertion that Section 205(a) compels the Commission to grant them an evidentiary hearing on the issue of unlawful discrimination. As we have stated (appendix D), it is our opinion that Section 205(a) requires only notice and comment procedures. We have given both parties the opportunity to submit three rounds of comments and they have failed to point to any particular issue on which cross-examination would have further developed the facts. Accordingly, we find that ARINC and ATA were accorded due process by this Commission and that they have not justified their single customer status, insofar as TELPAK is available to the airlines, on the basis of competitive necessity. American Public Gas Association v. F.P.C., 498 F. 2d 718 (D.C. Cir. 1974).

10. AT&T, GTE, and several other parties argue that public policy considerations alone justify the present single customer provisions. These parties have raised issues of law and policy, and consequently due process does not require that we resolve these issues through an evidentiary hearing. GT&E cites Transcontinental Bus Systems, Inc., v. C.A.B., 383 F. 2d 466 (5th Cir. 1967) (hereinafter Transcontinental) to support its contention that public policy considerations justify existing single customer provisions. In Transcontinental, independent motor carriers and a national trade association of motor bus operators sought review of a C.A.B. order approving the military standby, youth, and young adult tariffs of several air carriers. It is sufficient to note that the persons who qualified for service under these tariff provisions enjoyed substantially lower rates than other air travellers. The motor carriers maintained that only a cost difference was a valid justification for a discounted rate. The C.A.B., on the other hand, broadly argued that it legally could consider all factors that it considered as reasonably related to the tariff, including the public welfare, the competitive situation, and the needs of national defense in determining whether a rate is unjustly discriminatory. The court held that the C.A.B. is neither limited solely to consideration of reduced rates nor free to resort to unfettered consideration of public policy. The court's reasoning is most compelling, and thus we think it appropriate to quote from its decision at some length:

For while the Board has acquired an expertise in matters relating to air transportation, that expertise does not extend to and include all the social policy factors which it here argues it may evaluate and consider. The implementation of social policy on a broad and expansive scale is, within the Constitutional framework, a matter for Congress. While Congress may delegate to an administrative body under appropriate guidelines the actual implementation and execution of a general social objective incorporated in a statute, any intent to commit such matters to the agency must appear either explicitly or by necessary implication in the enabling statute. We are unable to find such delegated authority which would enable the Board to consider social policy factors which are not incorporated in the Federal Aviation Act of which have not been deemed relevant in the course of the history of rate regulation in the transportation industry. (383 F. 2d at 484). (Emphasis added).

Additionally, while the court in Transcontinental affirmed the CAB's approval of the military standby tariffs, it suggested that the tariffs were justified on the grounds that factors independent of the passengers' status as servicemen rendered the conditions of service dissimilar. The court noted that the C.A.B. had found that the standby tariffs enabled the air carriers to compete effectively against surface carriers for military business and that they increased the morale of the armed forces and thus contributed to the national defense.

11. Since the Federal Aviation Act of 1957, 49 U.S.C. §§1301 et seq., was also modeled on the I.C.A. we feel that Transcontinental is persuasive precedent. Accordingly, we may consider public policy factors as justifying the single customer provisions, but the factors which we properly may consider are only those which appear either explicitly or by necessary implication in our enabling statute. Section 1 of the Act (47 U.S.C. §151) charges us with regulating interstate and foreign wire and radio communication.

"/s/o as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication. . ."

In addition to these objectives, Title II of the Act (47 U.S.C. §§202 et seq.) infuses the rule of equality into our regulatory scheme for communications common carriers. Tariff provisions which are unlawfully discriminatory do not automatically become just and reasonable, and thus lawful, simply because they grant preferential treatment to an entity whose business is related to one or more of the social policies explicitly or implicitly found in the Communications Act. AT&T's Telpak offering, and equivalent discounted bulk services offered by other carriers, do not afford communications users service unavailable through other offerings; it does, however, give users a substantial discount for ordering bulk channels. Consequently we must ask whether, and in what way, the discriminatory rate preferences accorded single customer subscribers advance a social policy which we may consider as justifying the discrimination.

12. ARINC seeks to justify the airlines' preferential rate treatment on the grounds that it promotes safety of life and property. UTC makes the same contention relative to the electric utilities, and, moreover, asks the Commission to direct the carriers to extend this preferential rate treatment to other utility user groups. AT&T also argues that single customer status for both ARINC and the electric utilities is justified because it promotes safety of life and property. As noted, the Transcontinental case limits the extent to which our regulatory program may seek to further social policies. In formulating our regulatory scheme for common carriers we cannot consider social policies which do not appear either explicitly or by necessary implication in the enabling statute. Even if a social policy explicitly or implicitly appears in the Communications Act, Transcontinental does not obligate us to further the policy by one particular means--preferential rate treatment. We believe that we have discretion as to the means which we employ to carry out "the purpose of promoting safety of life and property through the use of wire and radio communications. . . ." 47 U.S.C. 151 (1970). In the ARINC case, supra, one of ARINC's complaints against AT&T was the latter's refusal to provide preferential press rates for private line teletypewriter service to the airlines to promote the safety of life and property in the air (4 F.C.C. at 156). But, as previously noted, the Commission held that the promotion of safety of life or property in the air through the use of wire and radio communications was adequately effectuated by requiring that AT&T treat ARINC as a single customer (4 F.C.C. at 166), and that preferential rate treatment was unrelated to the furtherance of that purpose. Id. at 167. After examining the comments of ARINC, ATA, UTC, and NAMBO, we have concluded that the statutory objective of promoting the "safety of life and property through the use of wire and radio communications" does not alone justify otherwise unlawfully discriminatory rates.

13. Several parties argue that single customer status should be extended to groups of users whose members are in the same line of business. This argument seems to be analogous to the C.A.B. cases which approved discriminatory rates for charter groups whose members had a prior affinity. ^{18/} The C.A.B. found that the "prior affinity" requirement did not create an unlawful discrimination. It reasoned that opening up regularly scheduled international flights over the North Atlantic to limited group chargers would increase the carriers' fill factors, which were alarmingly low, but which, if the composition of the group was restricted by the prior affinity requirement, would not create a massive diversion from the standard fare service, and thus defeat the very purpose of the group fares, i.e., increase the carriers' return on investment by raising their fill factors. Although the courts have not reversed the C.A.B.'s approval of affinity group tariffs, the United States Court of Appeals for the Second Circuit did state in dicta that,

there is something for saying that the individual passenger's affinity to some organization should be irrelevant to his right as a member of the public to have equal access to all modes of service offered by common carriers. ^{19/}

14. We do not think that similar tariff provisions extending single customer status with respect to Telpak service to groups of users whose members are in the same line of business would be in the public interest. The C.A.B. unquestionably has encountered substantial practical difficulties in applying the affinity group tariffs. Clear evidence of imperfections of these tariffs is found in the C.A.B.'s adoption of other regulations which make charter transportation available to all segments of the travelling public without regard to membership in affinity groups. We presently perceive no practical way of limiting the availability of Telpak sharing if single customer status is accorded to all "same line of business" groups. Moreover, there are differences between the air transportation and the communications industry which lead us to conclude that "affinity" would not be a reasonable justification for discrimination. One adverse effect would be the hinderance of communications between groups with different affinities.

^{18/} See, e.g., C.A.B. v. Carefree Travel, Inc., 513 F. 2d 375 (2d Cir. 1975); National Air Carrier Association v. C.A.B., 442 F. 2d 862 (D.C. Cir. 1971); and Agreement Adopted by the International Air Transport Association Relating to Group Fares, 36 C.A.B. 33 (1962).

^{19/} C.A.B. v. Carefree Travel, Inc., supra, 513 F. 2d at 389.

14.

15. We have heretofore mentioned that the Truckers (and NAMBO) contend that they also should be granted single customer status. In addition to advancing the safety of life and property arguments which we have already rejected, they contend that as a matter of public policy we should find tariff provisions lawful which work to equalize competition between air and surface carriers. Because we find ARINC's single customer status with respect to Telpak to be unlawful, and we extend the benefits of resale and sharing to all customers, we need not address this argument.

16. In view of the foregoing, we find that the single customer provisions are unlawfully discriminatory and thus in violation of Section 202(a) of the Act. Our decision herein will allow the governmental entities to continue to share communication services and facilities, either jointly or through an intermediary. Thus, the question whether provisions of the Communication Act and the Inter-governmental Cooperation Act provide a basis for special treatment of these customers is moot.

SEPARATE STATEMENT OF COMMISSIONER ROBERT E. LEE

In Re: Docket 20097, Resale and Shared Use of
Common Carrier Services and Facilities

I have carefully studied the issues in this proceeding and believe that the Commission's decision will lead to both more efficient uses of communications facilities and more flexibility for users of communications facilities in the public interest.

In my review of this proceeding, I have also been concerned that the Commission retain its flexibility to deal with problems which may arise under this decision or in other areas. I do not intend to limit the Commission's flexibility, and I am satisfied that this document will not restrict Commission decisions in the future.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Shared Use and Resale of Common Carrier Facilities
(Docket No. 20097)

With respect to the instant document, and though I concur, I am somewhat uneasy about the unlimited shared use of certain private line services and the possible siphoning of revenues from MTS, and hence from smaller carriers. I am uneasy that sharing may end the offering of certain useful classes of service. I am uneasy because we reject the AT&T cost study (for which I hold no particular brief), but fail to support our conclusions with our own economic analysis. Even if the AT&T cost study is dead wrong, and I have no reason to suppose either way on that, the FCC is charged with protecting the public and we do not offer herein a scintilla of economic data to buttress our own theorems of no economic impact to non-commercial subscribers or smaller carriers.

In a swoop, we here attempt a major alteration of the role of our primary communications carriers from end-to-end retailers to down-and-dirty wholesalers, supplying all sorts of middlemen (viz., other common carriers, brokers, managers, consultants, and other "match-makers"). However, I am not as offended by this action -- per se -- as I have been apprehensive about our blind forays into other so-called "competitive" atmospheres. 1/ It could very well be that, belatedly, we may have seized upon a more appropriate manner of affording innovative service to specialized users than the ones we fashioned in Specialized Common Carriers, 29 FCC 2d 870 (1971) or in portions of our terminal equipment initiatives. (See n. 1, below). If we had only struck out in this direction initially, I wouldn't feel as unsettled about having all of our balls in the air at once. If the sole initiative we had taken was resale and shared use

1/ See e.g., my dissents in Mebane Home Telephone Co., 53 FCC 2d 473 at 484 (1975), appeal denied, sub nom. Mebane Home Telephone Co. v. FCC, No. 75-1617 (D. C. Cir., April 26, 1976); Interstate and Foreign Message Toll Telephone Service, 58 FCC 2d 736 at 748 (1975), order stayed on appeal, sub nom. North Carolina Utilities Commission v. FCC, No. 76-1002 (4th Cir., April 28, 1976). See also my letter on H.R. 12323 to the Honorable Lionel Van Deerlin, Chairman, Subcommittee on Communications, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, May 25, 1976.

-2-

coupled with the interconnection of equipment that was not basic carrier-supplied terminals, I would have many fewer compunctions about this action. It is the cumulative effect of our competitive policies which may be unwise.

However, in sum, I become most uneasy when we use, as a principal rationale for permitting shared use and resale, the example experience in the railroad industry. In paragraph 37 of the Majority Order we observe that, over the objection of the railroad industry which alleged diversion of critical revenues, the I. C. C. compelled the brokering of carload shipments, labeling tariffs forbidding such sharing unreasonably discriminatory. We all know now, of course, that the rail carriers were only "crying wolf" and that competition and revenue diversion could not be a "serious" threat to the giant rail carriers which were as financially solid as the Pennsylvania Railroad or the New York Central. Right?

STATEMENT OF COMMISSIONER GLEN O. ROBINSON
CONCURRING IN PART AND DISSENTING IN PART

For the most part I agree with what the Commission has done in this proceeding. By invalidating present telephone carrier tariff restrictions on resale the Commission not only removes an unreasonable and discriminatory interference with subscribers' use of communications service, it also promotes economic efficiency by providing the

incentive for carriers to reprice private line services more in accord with the cost of service. In my view, both results admirably serve the public interest. I disagree, however, with the Commission's decision to treat resellers as common carriers subject to our certification and rate regulation processes and requirements. Such treatment is neither commanded by law nor supported by economic policy.

As far as the law is concerned the Commission's interpretation of the Act and the legal precedents seems to me unduly mechanical. The Commission first makes a finding that resale is a common carrier activity, whence it proceeds to the conclusion that it is subject to regulation under Title II of the Act. As with other specialized common carriers, see *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1150 (10th Cir. 1975), the Commission eases somewhat the rigors of traditional common carrier regulation by providing for "open entry." It also leaves open the precise character of certain regulatory restraints such as rate regulation. However, in general, resellers are formally subject to all the same regulatory restrictions and obligations imposed on other carriers.

Even conceding, for the sake of argument, that every communications common carrier is subject to the requirements of Title II, see *National Ass'n of Reg. Util. Comm'rs. v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied, — U.S. — (1976) (NARUC), and that the Commission may not decline to exercise its regulatory responsibilities thereunder, cf. *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), it does not, of course, follow that resellers are, or should be treated as, common carriers. What particular characteristics of resale make it a common carrier activity? The Commission, following the Court's opinion in the NARUC case, *supra*, stresses the importance of the offering: a common carrier "holds itself out or makes a public offering." But how is that determined where, as here, the carrier does not necessarily offer service to everyone who might seek it? The Commission's answer essentially relies on some aged precedents from the transportation field, plus our own, rather aged,² decision in *Mackay Radio and Telegraph Co.*, 6 FCC 562 (1938). On the strength of these precedents it in effect concludes that all resellers are common carriers.

I find the Commission's formalistic legal approach difficult to reconcile with the analysis which it employed and the Court approved in the NARUC case. There the Commission refused to stamp the common carrier classification on a new mobile telephone service despite a strong resemblance to existing services, some of which were regulated as common carriers. The Court affirmed on the ground that only "prac-

¹ This phrase connotes some degree of agency discretion in making this determination. Judicial opinion appears to be divided on the question whether the Commission has such discretion. Compare NARUC, *supra*, 525 F.2d at 644 (no discretion) with *Philadelphia Television Broadening v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966) (discretion). Whether or not the Commission has a full discretion to confer or not confer common carrier status, however, I presume the Commission has some discretion in evaluating the underlying factual considerations that pertain to such status. This discretion is inherent in the agency's general authority and responsibilities, see *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (discretion in ascertaining whether one company was in "control" of another within the meaning of Section 2(b) of the Act). However, it has particular force in the present circumstance given the vague contours of common carrier status. Spotting common carriers is not, after all, quite the same as spotting airplanes; so far as I am aware, Jane's has no illustrated manual of "All the World's Common Carriers."

² In a field as rapidly changing (both economically and technologically) as telecommunications a 1938 precedent should be skeptically reviewed—particularly where the precedent is not on all fours with the case before us.

tice and experience" would reveal whether the new services were offered in such a way as to require their regulation under Title II. Where is that "practice and experience" here? There is none.¹

If the Commission's decision to treat resellers as common carriers is not compelled by law, it is even less compelled by economic policy.² The traditional—and still valid—justification for regulating common carriers is the existence or probable emergence of monopoly power. The Commission makes no finding that resale is characterized by monopoly characteristics, and indeed its policy of open entry is explicitly based on the expectation of competition. At one point (fn. 86) it even concedes that the competitive character of the resale market minimizes the opportunity for excessive rates. I think this understates the point considerably. Given the customers' ever-present alternative of ignoring resellers altogether and dealing directly with the fully regulated telcos, as at present, I think the practical possibility of monopoly abuse can be dismissed.³

Nor do I see any materially greater need for concern about the possibility of discrimination. Here again the Commission's regulatory instincts cause it to rush forward to break down an open door. Discrimination is the product of monopoly. If the Commission's own expectations about the competitive nature of resale are justified, there should be no more opportunity for discrimination than for excessive charges.

Finally, the use of certification as a vehicle for examining financial, legal and technical qualifications in connection with entry—and exit—seems to me to be pointless interference. Again, if the market is workably competitive, what earthly purpose is served by such an inquiry other than (1) to add administrative burdens to carriers and Commission and (2) create opportunity for mischievous opposition from interested parties to foreclose or stall new entry—or exit? The second possibility bears further emphasis. Perhaps the greatest vice I see in the Commission's imposition of regulation is not the restrictions which it itself imposes on the carriers, but rather the opportunity which it gives to existing carriers to fight off new, competitive entry. The Commission can stress as much as it likes that it intends to permit open entry and to permit the forces of competition to work their (generally) benign purposes. But the simple reality—which all who labor in regulated vineyards know—is that regulation is not only a tool by which regulatory commissions protect the public against regulated carriers; it is also a tool by which regulated carriers protect themselves against competition. Given a chance to do so most regulated firms prefer to compete with their lawyers rather than their salesmen. In some cases there is no public alternative to permitting them to do so. But in the present case there is; accordingly, I would insist that the carriers fight their contest in the marketplace and not at the Commission. I predict, however, that despite the Commission's encouragement to compete in the marketplace, many carriers—including incumbent

¹It could scarcely be otherwise given that only "value-added" resellers have been permitted heretofore.

²I omit any reference to social policies other than those that would be commonly subsumed under the label "economic" since I know of no such "social" policies that would apply here.

³See generally Note, *Resale and Sharing of Private Line Communications Services*, A.T.&T. Restriction and FCC Regulation, 61 Va. L. Rev. 679, 719-28 (1975).

resale carriers—will avail themselves of the Commission's arena instead, just as they have done in the past—just as some have done in this case. I see very little social gain, and much potential for harm, stemming from such anti-competitive combat.

The Commission's regulatory approach is also a likely source of administrative confusion insofar as it attempts to distinguish resale, which is regulated, from shared use, which is not. This is a distinction which I think is both artificial and, ultimately, impossible to police effectively. One would suppose the distinction between the two ought to bear some relation to the propriety or expediency of common carrier regulation. But that is not the distinction the Commission makes. Instead, it purports to make the distinction thus: sharing is "a non-profit" arrangement where each user pays "the communications-related costs associated with subscription to and collective use of the communications services and facilities according to its pro-rata share" of the facilities' total use. Resale, in contradistinction, is the function of one entity offering services and facilities to another "for profit." The Commission never adequately explains the asserted difference between minimizing costs through sharing and searching for profits in resale but clearly it believes that the two are different. I suggest, however, that my colleagues would be on firmer ground if they followed the economic learning of Dr. Franklin: a penny saved is a penny earned.*

The resale/shared use distinction will not only lead to administrative difficulties in enforcement, it is likely to produce unnecessary transaction costs to the industry and to the consuming public. Since there is a premium attached to "sharing" as opposed to "reselling," business firms will have an incentive to incur extra trouble and expense to arrange their brokerage activities so that they may be characterized as sharing rather than resale. In addition, we may safely anticipate continuous, costly litigation against sharing arrangements from competing entities who allege that the sharing scheme is a sham, and that this agency or a state agency or some court ought to pierce mere appearances to acknowledge the transaction's "true" substance. In short, by making so much turn on an untenable distinction between "revenue production" and "cost savings," the Commission ensures that a whole tier of transaction costs, wholly extraneous to the intelligent and efficient administration of private line brokerage, will be imposed on such arrangements for many years to come, perhaps indefinitely.

Perhaps in the end it expects too much of a regulatory agency to ask it to relinquish its hold over a particular economic activity to see if the invisible hand will work as well as the regulatory fist. Innate conservatism plays a role here as does an affection for security—the security that comes from knowing that everything is, at least ostensibly, under control (whether it is or not in fact, is another matter). And then there is the regulators' professional bias for regulation as a preferred "life style." When I was in the Army, there used to be a saying: if it moves, salute it, if it doesn't move, paint it. In this branch of the government, we proceed according to a slightly different maxim: if it moves, regu-

*To put it in somewhat more refined, and more precise, terms, I do not think the Commission can distinguish between "profit" and cost recovery if, as I assume, the Commission intends to include in the latter category capital costs associated with the shared communications use. In fact, on the latter assumption, the Commission distinction between profit seeking and cost recovery is practically meaningless since what the accountant labels "profit" is generally an element of cost in economic terms.

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late it; if it doesn't move, kick it—and when it moves, regulate it.

With all due respect for a Commission decision that is more than half good, I must dissent to that part which I regard as bad—the part where the Commission finds it necessary to exercise its regulatory leg muscles on resale of common carrier services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 76-848

42271

In the Matter of

REGULATORY POLICIES CONCERNING RESALE
AND SHARED USE OF COMMON CARRIER
SERVICES AND FACILITIES

)
)
) Docket No. 20097
) RM-1997
) RM-2218

MEMORANDUM OPINION AND ORDER

Adopted: September 8, 1976

; Released: September 14, 1976

By the Commission:

1. The Commission has before it for consideration various motions filed pursuant to Section 1.429(k) of the Rules for stay, in part or whole, of the effectiveness of our Report and Order herein (FCC 76-641, released July 16, 1976). 1/ By Order released August 4, 1976, (FCC 76-746) we required that such pleadings be filed not later than August 16, 1976.

2. In the Report and Order herein, we found unjust and unreasonable and unlawfully discriminatory restrictions on the resale and shared use of common carrier private line services. Tariffs eliminating such restrictions were required to be filed no later than September 15, 1976. In addition to the motions to stay the effectiveness of the Report and Order, parties have filed petitions for reconsideration of our action. These petitions will be acted upon at a later date, although we have considered the matters argued therein in our disposition of the motions for stay.

3. Parties filing the motions for stay generally agree that they should be considered pursuant to the criteria set forth in Virginia Petroleum Jobbers Association v. F.P.C., 259 F. 2d 291 (D.C. Cir. 1958). We have heretofore recognized the standards enunciated in that case to be applicable to our disposition of motions for stay. See, e.g., Communications Satellite Corp., 57 F.C.C. 2d 571 (1976). In reviewing the motions

1/ Motions for Stay (or pleadings similarly entitled) were filed by American Telephone and Telegraph Co., TRT Telecommunications Corp., Southern Pacific Communications Co., RCA Global Communications, Inc., Computer and Business Equipment Manufacturers Ass'n., GTE Service Corp., Telenet Communications Corp., Western Union International, Inc., Aeronautical Radio, Inc. and Air Transport Ass'n of America jointly, and ITT World Communications, Inc. An opposition to AT&T's motion was filed by American Trucking Ass'ns, Inc., and AT&T replied thereto.

before us, it is evident that there are varied interpretations of the policies set forth in the Report and Order. Under such circumstances, we believe that the public interest would be served by an extension of the period within which revised tariffs must be filed. In view of this action, we will not set forth all the arguments before us to determine to what extent they comport with the criteria set forth in Virginia Petroleum Jobbers Association. By specifying a date sufficiently in the future for the filing of revised tariffs, we will have an opportunity to first act on the pending petitions for reconsideration. Likewise, the public will have a date certain by which new tariffs will be on file permitting persons to resell or share private line communications services and facilities.

4. Accordingly, IT IS ORDERED, That paragraph 132 of our Report and Order herein released July 16, 1976 (FCC 76-641), as modified by our Order released August 4, 1976 (FCC 76-746), IS MODIFIED to provide that revised tariffs eliminating restrictions on the resale and shared use of common carrier private line services and facilities shall be filed not later than December 15, 1976.

FEDERAL COMMUNICATIONS COMMISSION


Vincent J. Mullins
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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75462

In the Matter of) Docket No. 20097
)
REGULATORY POLICIES CONCERNING RESALE) RM-1997
AND SHARED USE OF COMMON CARRIER) RM-2218
SERVICES AND FACILITIES)

Adopted: December 3, 1976 ORDER ; Released: December 7, 1976

By the Chief, Common Carrier Bureau:

1. On July 16, 1976, the Commission released its Report and Order in the above-captioned proceeding (FCC 76-641, 60 F.C.C. 2d 261). Carriers subject to the Commission's jurisdiction were required to file revised tariffs which eliminate restrictions on the resale and shared use of interstate private line communication services and facilities. By Memorandum Opinion and Order released September 14, 1976 (FCC 76-848), such revised tariffs were required to be filed not later than December 15, 1976.

2. Petitions for Reconsideration of the Report and Order have been filed and are under Commission consideration. Although these Petitions will be acted upon in the near future, it appears that release of a decision thereon may not be possible prior to the December 15 deadline. We recognize that the issues herein are complex and that carriers should have the benefit of final Commission action in this proceeding before they are required to file revised tariffs to implement the policy set forth in the Report and Order. Accordingly, the date by which tariffs must be filed as required by paragraph 132 of the Report and Order is hereby extended to January 17, 1977.

3. This action is taken by the Chief, Common Carrier Bureau on his own motion pursuant to authority delegated by Section 0.291 of the Commission's Rules and Regulations.

Walter Hinchman

Walter R. Hinchman
Chief, Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 77-34
43703

In the Matter of	)	Docket No. 20097
	)	RM-1997
REGULATORY POLICIES CONCERNING RESALE	)	RM-2218
AND SHARED USE OF COMMON CARRIER	)	
SERVICES AND FACILITIES	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 1977 ; Released: January 12, 1977

By the Commission: Commissioner Lee absent; Commissioners Hooks and Quello concurring in the result.

1. Before the Commission are Petitions for Reconsideration (and pleadings related thereto) 1/ of our Report and Order in the captioned proceeding (FCC 76-641, released July 16, 1976, 60 F.C.C. 2d 261). In the Report and Order, as modified by further orders (FCC 76-746, 60 F.C.C. 2d 588; FCC 76-848, 61 F.C.C. 2d 70 ; Mimeo No. 75462), we required that common carriers subject to our jurisdiction file revised tariffs

1/ Petitions for Reconsideration were filed by Western Union Telegraph Company (Western Union), United System Service, Inc. (United), GTE Service Corp. (GTE), Southern Pacific Communications Company (SPCC), Aeronautical Radio, Inc. and the Air Transport Association of America, (ARINC), International Business Machines Corp. (IBM), Computer and Business Equipment Manufacturers Association (CBEMA), Remote Processing Services Section of the Association of Data Processing Service Organization (RPSS), Western Union International, Inc. (WUI), TRT Telecommunications Corp. (TRT), United Press International, Inc. (UPI), Telenet Communications Corp. (Telenet), and American Telephone and Telegraph Co. (AT&T). RCA Globcom Systems, Inc. and Dow Jones & Company, Inc. filed petitions for clarification. RCA Alaska Communications, Inc., CBEMA, Securities Industry Automation Corporation (SIAC), MCI Telecommunications Corp. and Microwave Communications, Inc. (MCI), and American Broadcasting Companies, Inc., CBS, Inc. and National Broadcasting Company, Inc. (the Network Parties) commented on various Petitions for Reconsideration. AT&T and RPSS filed replies to these comments.

no later than January 17, 1977, which eliminate restrictions on the unlimited resale and sharing of their interstate private line communications services and facilities. As detailed below, various parties urge that we clarify or reconsider aspects of the Report and Order and that upon reconsideration modifications be made.

Procedural Considerations

2. In the Notice of Inquiry and Proposed Rulemaking (the Notice) in this docket (47 F.C.C. 2d 644), we stated our intention to conduct this proceeding by written presentations, with the parties afforded an opportunity to file comments, reply comments and response comments. We set forth in the Notice grounds upon which such procedures were justified for resolution of the issues. We also considered the question of appropriate procedures at great length in Appendix D of the Report and Order. However, several parties argue in their petitions for Reconsideration that our procedures herein fail to satisfy statutory requirements and judicial precedent, and that, at the minimum, the Commission must provide for oral, trial type hearings to resolve the issues under consideration. Our discussion in the Report and Order generally anticipated and answered the arguments made in support of these positions. Nevertheless, we will again look to applicable law, policy and precedent.

3. This proceeding has been a rulemaking conducted pursuant to Section 4 of the Administrative Procedure Act (5 U.S.C. 8553). 2/ It

2/ 5 U.S.C. §551(4) defines "rule" as:

. . . the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

is not adjudicatory, as that term is used in the A.P.A. ^{3/} Section 4 provides for "notice and comment" procedures as used herein, except that the formal hearing requirements of Sections 7 and 8 are applicable when rules "are required by statute to be made on the record after opportunity for an agency hearing. . ." The issue, then, is whether the language of Section 205(a)--"full opportunity for hearing"--is a statutory requirement which brings into play the procedures set forth in Sections 7 and 8. ^{4/} After lengthy consideration of this matter in the Report and Order, we concluded that the language of Section 205(a) did not require a trial type hearing in all instances. We considered the legislative history of Section 205(a) of the Communications Act and its predecessor provision in the Interstate Commerce Act (I.C.A.) and found that Congress did not have in mind that trial type hearings were required in all circumstances under Section 205(a). Moreover, we considered the nature of this particular proceeding and determined that the Commission herein is not acting in a quasi-judicial capacity which might require trial type hearings. Even if we were found to be acting in a quasi-judicial capacity, we concluded that the parties had not been denied due process of law by our procedures. AT&T argues to the contrary, and maintains that a prescription of rates or practices pursuant to Section 205(a) may be accomplished only after trial type hearings.

4. AT&T cites I.C.C. v. Louisville & Nashville R.R. Co., 227 U.S. 88 (1913), as holding that Section 15(1) of the I.C.A. (the predecessor of Section 205(a) of the Communications Act) mandates trial type hearings. In the Report and Order, we discussed this case, which has been described as a "pre-Administrative Procedure Act case which is fully out of harmony with that statute." Phillips Petroleum Co. v. F.P.C., 475 F. 2d 842, 849, n. 7 (10th Cir. 1972). We stated that in Louisville, the I.C.C. was acting in a quasi-judicial capacity and that the case spoke in constitutional terms, not in terms of administrative law generally. See United States v. Florida East Coast Ry Co., 410 U.S. 224 (1973). AT&T also cites National Ass'n of Motor Bus Owners v. F.C.C., 460 F. 2d 561 (2d Cir. 1972), in support of the view that Section 205(a) itself has been interpreted to require trial type hearings. Again, we discussed N.A.M.B.O. in the Report and Order and concluded that the court's language was not

^{3/} The fact that no specific Commission rules were ultimately adopted does not affect the classification as a rulemaking proceeding.

^{4/} As we noted in Appendix D, however, even proceedings conducted under Sections 7 and 8 may not require trial type procedures in certain circumstances.

controlling as to the type of hearing required herein. The court did not state that trial type hearings were required by the statute; it merely cited our language in Telpak, 31 F.C.C. 2d 674 (1971), that prescription of unlimited Telpak sharing would have required a fuller evidentiary record. Whether the evidentiary record could be developed only by trial type hearings was not at issue. 5/ Finally, AT&T cites Independent Bankers Ass'n of Ga. v. Board of Governors, 516 F. 2d 1206 (D.C. Cir. 1975), as support for its position that trial type hearings are required when an administrative agency weighs the public benefits and detriments associated with a course of action. That case is readily distinguishable from the situation at hand. In Independent Bankers Ass'n, the Board of Governors approved a bank's application without trial type hearings, acting under a statutory provision which, prior to amendment, concededly required trial type hearings. The Board argued that amendments to the statutory provision allowed it to act on individual applications by "notice and comment" procedures. The court, however, viewed the amendments as merely making it possible for the Board to make:

5/ While our language in Telpak did imply that we would have to conduct additional trial type hearings to prescribe unlimited Telpak sharing, that view was made in the context of a specific type of restriction in the tariff offering of a particular carrier, unlike our formulation here of general policy applicable to the industry. As the Court of Appeals recently commented in Bell Telephone Co. of Pa. v. F.C.C., 503 F. 2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975):

The Commission's former policy of evaluating inter-connection on a case-by-case basis was not predicated upon a belief that §201(a) required such a policy. Rather, it was developed as a matter of procedural policy, reflecting the Commission's view of the most efficacious and just method of administering inter-connection petitions. In the absence of a statutory mandate, we see no reason to bind the Commission to this procedural policy. As technology develops and the field of communications changes, procedural, as well as substantive, policy must be flexible. The mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach. (503 F. 2d at 1264-5)

... determinations of general applicability by regulation. In short, the statute now recognizes the time-honored distinction between rulemaking and adjudication. As a general matter, agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact.' Adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular 'adjudicative facts.' (Footnotes omitted) (516 F. at 1212)

Thus, in that proceeding the Board was faced with judging the merits of a particular contested application--a function previously deemed by the applicable statute to require trial type hearings because it was "almost entirely adjudicative in character." (516 F. 2d at 1217). In contrast, the proceedings herein have been to determine general policy applicable to all carriers on a prospective basis--a function which is entirely consistent with rulemaking and "notice and comment" procedures. Therefore, the arguments of AT&T, which are generally supported by certain other parties, are found to be without merit.

5. Having determined that this proceeding is governed by Section 4 of the A.P.A., we dismiss the contention of GTE that those who desire a change in the carriers' tariffs have the burden of proof. The citation in its Petition at p. 7 is to Section 7 of the A.P.A., which, as we have stated, is not applicable to this proceeding. We maintain the position set forth in the Report and Order that it is incumbent upon the carriers to justify tariff provisions which grant service to certain sharing and resale entities while denying service to others similarly situated. If there are any criteria supporting the selection of the "single customer exceptions" and other restrictions discussed in the Report and Order, they have not been satisfactorily explained in the record. Instead, AT&T in its Comments described the entities presently allowed to share. It is not clear how it determined, for example, that the electric utilities, but not trucking companies, should be allowed to share private line services. We stress, however, that our prescription of unlimited resale and sharing of private line services and facilities as just and reasonable is not based solely upon the failure of the carriers to justify the restrictions which have discriminated unlawfully among customers. Rather, we have also looked to the evidence in the record herein to determine that unlimited resale and sharing would bring about the public benefits described at paragraphs 75-88 of the Report and Order, and that there will be no adverse impact resulting therefrom. We will consider these matters below.

6. There are several further procedural matters which warrant comment. First, AT&T argues that the Report and Order is really a prescription of rates because the outcome of the decision will be a switching of services by customers, citing A.T. & T. v. F.C.C., 449 F. 2d 439 (2d Cir. 1971). We disagree with this proposition that we must actually determine the specific rates that will flow as our policy decision herein is implemented.

We discussed this matter in the Report and Order (para. 49) and stated that we did not envision a "large scale rate reduction" as inherent in our decision. Moreover, in Docket No. 18128 we found unlawful AT&T's Telpak service, and required that it be eliminated, although AT&T may file a new bulk offering. FCC 76-886, released October 1, 1976, para. 208. Thus, there is now no evidence that elimination of the restrictions on resale and sharing of Telpak will cause any substantial migration from other services into the bulk rate service. In any event, we disagree with the general proposition that prescription of communications policy must be accompanied by prescription of the exact rates just and reasonable thereunder. Such a requirement would constrain our ability to regulate except on a case-by-case basis--a concept clearly out of harmony with effective administrative action. In Specialized Common Carrier Inquiry, 29 F.C.C. 2d 870 (1971), aff'd sub nom., Washington Utilities and Transportation Comm. v. F.C.C., 513 F. 2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975), we found as a policy decision that the public interest would be served by the open entry of specialized common carriers in the domestic private line market. We noted therein that the impact of the decision might require AT&T to deaverage its private line rates. There was no implication that we were required to actually set the rates on a deaveraged basis, however.^{6/} The instant situation is similar to that proceeding. Every policy statement can be said to have an ultimate impact on rates to be charged thereunder. We conclude that neither the legislative intent nor the language of Section 205 requires that we set rates in this proceeding. ^{7/}

7. GTE, and to some extent AT&T, argue that the reasonableness of tariff provisions prohibiting the resale of services and facilities is not a proper issue. GTE states that the order is unconstitutional to the extent that it requires carriers to serve "a new wholesale market which is not within the scope of their public undertaking." GTE Petition at 3. This position is not supported by any precedent under the Communications Act and is totally at odds with our statutory mandate and judicial interpretation thereof. The obligations of carriers and our jurisdiction with respect to those obligations are well settled. See, e.g., Bell Telephone Co. of Pa. v. F.C.C., supra; 47 U.S.C. § 201 (a). Also, we are not in the first instance requiring carriers to serve a "wholesale" market. As we pointed out repeatedly in the Report and Order, the evidence is that the carriers, primarily AT&T, have historically provided "wholesale" services to other carriers for resale. With the creation of exceptions allowing the Composite Data Service Vendors (CDSVs)

^{6/} AT&T's position is also contrary to the decision in Nader v. F.C.C., 520 F. 2d 182 (D.C. Cir. 1975), where the court found that the Commission could--and did--prescribe a rate of return under Section 205(a) without actually prescribing rates.

^{7/} GTE requests (Petition at 19) that we make clear that the Report and Order does not entitle resellers or sharers to rates different from those charged other customers. Whether different rates are proper is not at issue in this proceeding.

to obtain service for resale, carriers did not have to own their transmission facilities. What we now do is to require that the provision of services and facilities for resale be extended to all carriers certified by this Commission to provide interstate private line service. In short, CTE's view of the obligations of a common carrier operating under the Communications Act is unduly narrow and is hereby rejected.

8. Finally, AT&T states or implies in several parts of its Petition that trial type hearings would have established the soundness of its position and the impropriety of that adopted by the Commission. We have carefully considered the points which it raises in this regard, but we find that it has not been prejudiced by its inability to have the various positions herein tested by cross-examination. AT&T's most specific argument on this point deals with our rejection of its economic impact study. As we detail in para. 15, infra, our decision herein not to eliminate restrictions on WATS and our elimination of Telpak in Docket No. 18128 make those aspects of the study not relevant to the issues now before us. Even if we accepted the methodology after such a hearing, we have found that the impact shown therein is not so substantial that it warrants retention of the restrictions. Thus, we have no reasonable expectation that different procedures would have led us to a different result in these areas or to a different policy statement generally, nor do we find upon review of the record that any party is prejudiced by our decision not to hold further proceedings. 8/

9. In summary, we have again reviewed the procedures which led to our finding that restrictions on resale and sharing of interstate private line services and facilities are unjust, unreasonable and unlawful. Upon such review, we are convinced that the procedures herein are lawful and appropriate to the occasion. Neither the statutory language nor the legislative history of Section 205(a) requires trial type hearings in all proceedings. We are here dealing with the formulation of policy to be applied prospectively throughout an entire industry. Participating in this proceeding are numerous parties with diverse interests which nevertheless touch upon the basic question set forth in paragraph 1 of the Notice. As the Court of Appeals recently commented in Bell Telephone Co. of Pa., supra: 9/

Non-evidentiary rulemaking permits broad participation in the decision-making process and enables an administrative agency to develop integrated plans in important policy areas.

8/ Several parties protested the finality of the Report and Order, citing our statement in para. 40 of the Notice that we would issue a First Report and Order in this proceeding. They read that as mandating further hearings on the issues herein. However, our statement was qualified by the requirement that such procedures must "appear necessary or appropriate." For the reasons set forth in the Report and Order and in this document, we believe that further proceedings as to the lawfulness of restrictions on domestic services and facilities would adduce no additional significant evidence.

9/ In that case, the court refused to read into Section 201 of the Act (which calls for an "opportunity for hearing") the requirement that all hearing thereunder be trial type.

* * *

When an administrative agency develops a general policy applicable on a prospective basis, courts have found it unnecessary to require evidentiary hearings. /citations omitted/ This reluctance to prescribe evidentiary hearings on matters of general policy is grounded largely in practical considerations. Evidentiary hearings become 'totally unmanageable' when parties attempt to cross-examine the large numbers of persons normally interested in the development of policy. (503 F. 2d at 1265, 1266)

Issues Warranting Reconsideration

10. We turn now to the specific areas as to which reconsideration is sought. First, we will briefly discuss two matters which we dealt with in the Report and Order, but which we now deem more appropriate for consideration elsewhere. WUI and TRT argue that the policy of unlimited resale and sharing of private line services and facilities should not be applicable to international services.^{10/} They do not take a position as to the lawfulness of such restrictions on domestic private line services, but instead point to alleged differences between domestic and international services and special concerns peculiar to the latter. We will not discuss these contentions herein, as we have determined on reconsideration that our policy requiring unlimited resale and sharing of private line services and facilities should not at this time be applied to international services. In view of this determination, we need not address herein WUI's contention that the Notice was inadequate to inform it that the lawfulness of its tariffs was at issue in this proceeding. We will institute a separate proceeding in which the lawfulness of tariff provisions which restrict sharing and resale of international services and facilities will be examined. We emphasize that our action herein is not a finding that existing restrictions on international services and facilities are just, reasonable or not unlawfully discriminatory.

^{10/} RCA Globecom, Inc. and International Telephone and Telegraph Co. made similar arguments in their Motions for Stay, but they have not filed Petitions for Reconsideration. Their Petitions for Review of the Report and Order are pending in the United States Court of Appeals for the Second Circuit (No. 76-4190; 76-4201). In acting on reconsideration herein, we have taken into account the arguments made by these carriers in support of their Motions for Stay.

11. We stated in the Report and Order (para. 118):

However, due to the significant potential which exists for the cross-subsidization of these competitive [resale] service offerings from the basic monopoly services. . . we believe that the principle of "maximum separation" enunciated in the Computer Inquiry should apply here as well. Accordingly, underlying carriers which provide basic monopoly services as part of their normal business will be required to establish separate, arms-length subsidiaries in order to engage in resale or related activities. (footnote omitted)

Western Union objects to this requirement and requests that it be deleted. It states that it apparently is the only carrier to which the requirement will apply, that it leases from telephone companies a substantial amount of facilities to provide private line services, that complete separation (no sharing of facilities) of its monopoly and resale services would be disastrous, and that even if sharing of facilities were allowed between the corporations, there would still be available the potential for cross-subsidization. However, its administrative costs would be increased. We believe on reconsideration that it is appropriate not to require establishment of separate corporations by a carrier providing both monopoly and resale private line services and facilities. We will carefully scrutinize any resale by a monopoly carrier and take appropriate action to assure that cross-subsidization does not exist. 11/

Adequacy of the Record

12. We have carefully considered the arguments presented in support of a change in the Report and Order, and, except for the matters dealt with in the preceding two paragraphs, find them not to be convincing. One argument made throughout AT&T's petition, and also mentioned by GTE, is that there allegedly is no rational basis in the record which supports the policy enunciated in the Report and Order. We recognize that there must be adequate support in the record for our action, notwithstanding any question as to the lawfulness of the procedures used to develop the record. We believe that the record herein does contain ample support for our action, and that the path which led us to find unlawful the restrictions on resale and sharing of domestic private line services and facilities is clearly discernible. A brief review of the record is appropriate.

11/ By this action, we do not, of course, change in any way the requirements of Section 64.702 of the rules requiring a separate corporation for a carrier's provision of data processing services.

13. One factor which led to institution of this proceeding was the existence of specific tariff provisions which allow certain intermediaries to obtain service on behalf of third parties, while other users are denied such service through an intermediary. In Issue 9 we called for justification of such provisions, which were created by the carriers and never approved by this Commission. These provisions are prima facie discriminatory in their different treatment of customers who are similarly situated, and we concluded that the provisions are unlawfully discriminatory under Section 202(a) of the Communications Act. This conclusion is supported by two factors. First, the carriers failed to provide any justification ^{12/} for the selection of certain intermediaries entitled to service, and also failed to explain why an intermediary such as that proposed by The American Trucking Associations, Inc. (ATAI Comments at 2-6) should not receive service. However, our conclusion that sharing through intermediaries is just and reasonable is not based only on this failure of the carriers to justify their restrictions. We also received extensive comments from sharing intermediaries already recognized by the carriers. The sharing arrangements as described in the record in this proceeding are, in our view, convincing evidence that such communications operations serve an important public function and should be encouraged if we are to carry out our mandate under the Communications Act. See, e.g., ARINC Comments at 4-50; SIAC Comments at 3-35. The record fully supports our conclusion that unlimited sharing of communications services and facilities, both in joint use arrangements and through intermediaries, is just and reasonable.

14. In the Notice, we also called for comments on the justification in carriers' tariffs which restrict or prohibit resale by a customer. The record again supports our conclusion that unlimited resale of private line services is just and reasonable; inherent in this conclusion is our finding that entities reselling such services or facilities are common carriers and must be regulated under Title II of the Communications Act. As we noted in the Report and Order, AT&T already makes available its "facilities" for resale by "Other Common Carriers" as it defines that term in its Tariff F.C.C. No. 266, Section 2.6. However, we noted that another reason leading to this inquiry was the emergence of the "value added carriers" which own no communications facilities but which are certificated to provide a communications service. While these carriers are apparently

^{12/} As noted above, AT&T's "justification" was really only a description of those now entitled to service. No criteria for approval of intermediaries in the future was given. Clearly, such case-by-case approval of sharing arrangements has limitations as it places procedural burdens on this Commission's regulation of AT&T's private line tariffs.

not entitled to AT&T "facilities" because they are not OCCs, they are entitled to resell WATS. Three carriers of this nature, Telenet, Graphnet and PCI, filed comments and we have heretofore described the services which they provide or plan to provide. See Note 14 of the Report and Order; Graphnet comments at 1-2. The operation of resale carriers, which have received certification by this Commission and have established their technical and financial qualifications, is convincing evidence that the resale of communications services and facilities has provided significant communications benefits. These carriers have been able to provide their unique services without the expense associated with construction of facilities. In the Report and Order, we foresaw the certification of carriers which may not "augment" the services or facilities which they receive; we referred to them as resale brokers. See Report and Order, para. 19. While the services which they provide may not appear to "add value" to that which they receive, and while they may provide nothing which the underlying carriers do not already provide, we believe that there is record support for authorizing their operation. We concluded in the Report and Order (paragraph 85) that "brokerage" leads to efficient use of private line services and facilities, and thus decreases the need for investment in facilities which may be underutilized. See OTP Reply Comments at 27-8. ^{13/} Also, as OTP noted (OTP Reply Comments at 21-24), the introduction of brokers can aid in insuring that the tariffs of the carriers from whom they obtain services or facilities are internally consistent. We have repeatedly stated that the primary justification for a tariff rate must be the cost of providing the service; brokerage is a tool which will assist in the effectuation of this policy. If the tariff offerings are truly cost related, there will be little if any economic incentive for such brokerage. Parties to this proceeding, such as Western Union, have objected to tariffs and policies which encourage non-cost related bulk rates. In summary, we conclude that the record supports the view that the public interest is served by certification of carriers which operate between the carrier owning the transmission facilities and the ultimate customer, even if the "middleman" is purely a "broker."

15. In the Notice, we recognized that the record in this proceeding should include evidence of the impact on the carriers and on the public of removal of the restrictions on resale and sharing. AT&T submitted a study, which we discussed at length at paragraphs 56-62 of the Report and Order, and states (AT&T Petition at 26) that no party herein has submitted economic data or analysis which supports our findings or refutes its analysis of the economic impact of unlimited resale and

^{13/}AT&T "suggests" (Petition at 4) that OTP's filing should have no status in this proceeding because it was submitted after the filing date for comments. However, we have treated OTP's submission as timely filed "Reply Comments." The filing of reply comments was not limited to parties which filed comments, so long as such reply comments were properly served on all parties. AT&T and others thus had an opportunity in their response comments to challenge OTP's position, and many parties, including AT&T, did comment critically on OTP's filing. Thus, it is incorrect for AT&T to allege (Petition at 4) that " . . . no opportunity was furnished for the refutation of OTP's spurious and unsupported contentions."

sharing. We have viewed this matter again and conclude that unlimited resale and sharing of private line service would not have an adverse economic impact on the carriers or the public. We first note, as we pointed out in paragraph 65 of the Report and Order, that the amount of non-Telpak private line revenues which would be affected by our policy is relatively small. Moreover, we found that the study contained certain methodological deficiencies which tended to overstate the expected revenue loss to AT&T from unlimited resale and sharing. Thirdly, we have not required the removal of the restrictions on resale and sharing of WATS, and thus any revenue loss based upon a movement into a resold or shared WATS will not materialize. This point is important, as a premise of AT&T's study was the assumption that a change in the restrictions on WATS would lead to a decrease in MTS revenues, shifting costs from interstate operations to intrastate (See AT&T Comments at 31). Finally, we point out that AT&T alleged a revenue shift of \$24 million from MTS-WATS to Telpak. As noted above, in Docket No. 18128 we found Telpak to be unlawful and have required that AT&T withdraw the present offering. In the Report and Order, we stated at note 66 that because we did not have before us a true "bulk rate" available only to large users who otherwise would shift to private microwave, we need not decide whether restrictions on resale and sharing thereof would be just and reasonable. It is sufficient to say now that our findings in Docket No. 18128 as to Telpak cast doubt upon even the shift from other services to a bulk rate offering. Moreover, it can be concluded from our decision in Docket No. 18128 that the new rate schedules will make the relationship of MTS-WATS rates to private line rates relatively more favorable than that which existed at the time of AT&T's study. Thus, even if we accept AT&T's methodology, the study, considered in light of our recent rulings as to WATS and Telpak, fails to show that our action will have significant economic impact on AT&T or on intrastate revenue requirements. With respect to this latter point, we note that we have recently instituted a proceeding to consider necessary changes in separations procedures resulting from our requirement that customers be allowed to connect their own terminal equipment to the telephone system. See Impact of Customer Provision of Terminal Equipment on Jurisdictional Separations, Docket No. 20981 (FCC 76-1008, released Nov. 8, 1976). If experience proves that there is any sizeable shift of revenue requirements to intrastate as a result of our action herein, the place to resolve that is in a similar proceeding. One final point as to AT&T is pertinent here. We believe that the record herein and the operations of the resale carriers now certificated by the Commission lead to the logical conclusion that a wider availability of communications offerings by carriers not owning facilities will stimulate the market demand for the facilities and services of AT&T and the other carriers owning facilities. AT&T did not attempt to study what demand would be created as new carriers provide service using its facilities; indeed, given the rapidly changing nature of the industry, measurement of such stimulation by the carriers or the Commission may not be possible. In any event, the record establishes that the demand

for new services exists and is now being partially exploited by the "resale carriers." Our action here opens the market to other carriers who wish to subscribe to AT&T and other carriers' facilities and services to offer the public what they perceive to be a desired service.

16. For the foregoing reasons, we believe that there is record support for the conclusion that unlimited resale and sharing would not adversely affect the carriers owning facilities or produce a shift of revenue requirements to intrastate operations of any substantial degree. We also believe that there will be no substantial economic impact on the specialized common carriers operating in competition with AT&T for private line services, although we do recognize the possibility of a shift of customers from SCCs to resellers of AT&T's services and facilities. The record data showing such a shift was premised upon the movement of customers from an SCC private line offering into a resold or shared Telpak. See AT&T study at 11; Datran Comments at 32). We pointed out in the Report and Order (note 64) that the specialized carriers would be able to mitigate the effect of such shifts by themselves subscribing to Telpak for resale to their customers. Our recent finding that Telpak has not been justified by competitive necessity and must be eliminated makes even more questionable the amount of adverse economic impact on the specialized carriers as a result of our action herein. In its Petition, SPCC argues that "... the Commission's established policy of full and fair competition requires that Telpak rates not be made the basis of an entire new type of competition unless and until these Telpak rates have been determined to be lawful." (SPCC Petition at 4). We are unwilling to delay implementation of our policy until the lawfulness of a revised bulk rate tariff, filed in response to our decision in Docket No. 18128, is established. ^{14/} The effective date of tariffs filed as a result of our decision herein will preclude any significant resale or sharing of Telpak as it now exists. See paragraph 28, infra.

17. To summarize, we believe that the record fully supports our position that unlimited resale and sharing of domestic private line services and facilities are just and reasonable; that the "single customer"

^{14/} Western Union and MCI, which also argued against non-cost justified bulk tariff rates, did not on reconsideration request delay in resale and sharing of Telpak.

provisions are unlawfully discriminatory; 15/ and that the provision of service by an intermediary between the carrier owning the facilities and the customer will bring about important public benefits (described at paragraphs 75-88 of the Report and Order) while not causing adverse economic impact on the carriers or the public.

Other Aspects of the Report and Order

18. Many parties have raised specific objections to portions of the Report and Order, which, in their judgments, must be clarified or modified upon reconsideration. We now turn to those arguments. AT&T states that in the Report and Order, we have ignored the significance of the difference between the terms "service" and "facility," and that such blurring of the distinction raises "serious questions" about its ability to implement tariffs filed in response to the settlement agreement in Docket No. 20099. See AT&T, 52 F.C.C. 2d 727 (1975). AT&T states that under the agreement, the Bell System provides facilities to other carriers which in turn provide service to their customers. It questions whether it is required to continue the separate offering of facilities, and whether resellers and sharers are entitled to facilities as well as services. We commented in the Report and Order (paragraph 30) that our action in this proceeding was not expected to abrogate the settlement agreement in Docket No. 20099. We adhere to that position and point out that we expect the engineering and operating agreements in Docket No. 20099 to be effectuated under our policy herein. The definitions of "service" and "facility" may not be as distinct as AT&T purports to make them, and the degree of significance in the use of those terms for regulatory purposes is unclear. We need not comment in detail on that point, however. AT&T has not been required herein to change its obligations to its customers, except for removal of the restrictions on resale and sharing. We do not hold that sharers or non-OCC carriers are entitled to communications under the "facilities tariff" as it now exists. If such entity shows a need to obtain "facilities" we will consider the reasonableness of the tariff restrictions at that time. What we have done is to require that when a common carrier makes an offering to

15/ ARINC states that we should not have found the "single customer" provisions to be unlawfully discriminatory, and that, in any event, the issue was moot. We believe it not to be moot and again affirm our analysis, set forth in Appendix E, which led us to conclude that the provisions are unlawfully discriminatory. The point which we find to be moot is whether federal statutes support preferential treatment of the federal and state governmental agencies.

to a customer (whether another common carrier or not) which allows that customer to communicate, the carrier may not restrict the customer's ability to resell or share what it has received. ^{16/} Whether, under our policy and present AT&T practices, a separate "facilities tariff" is now required is beyond the scope of this inquiry.

19. One subject which has apparently caused confusion and misunderstanding is our discussion of the "maximum separation" rule, Section 64.702 of the Commission's Rules. In the Report and Order, we stated at paragraph 118:

Although we do not herein adopt any changes in Section 64.702 of the Rules, we believe that a resale carrier providing the services which we reasonably anticipate (see paragraphs 75-88, supra) may not be able to do so consistent with the requirement of separate corporations. We note in this regard that the purpose of the rule is to insure that no cross subsidization exists between a carrier's monopoly services and its data processing services. Because we anticipate that resale services will be provided by entities which do not provide monopoly services, it appears that the public interest would be served by a waiver of Section 64.702 for such entities upon their request, on a case by case basis. Thus, we will consider requests for waiver of the rule in light of the considerations set forth in this Report and Order.

This statement, and our references to the nature of the industry which may result from our action in this proceeding (Report and Order, para. 84) have led to two related reconsideration requests. Several parties (CBEMA, RPSS and Telenet, e.g.) state that we have, in effect, waived the provisions of Section 64.702 for an entire class of carriers and that such action is not proper in this proceeding, if at all. Also, CBEMA and IBM express their concern that we have herein extended our jurisdiction to data processing and other operations which use private line communications, because such concerns "resell" the communications which they obtain. Neither fear is justified by our action. With respect to Section 64.702, we point out that we have specifically stated that we are not changing that rule herein, and that requests for waiver would be considered on a case by case basis. We did not intend to imply that the rule would automatically be waived upon request of a resale carrier, although we recognize that our statement in the above quotation ("the public interest would be served by a waiver") gives rise to such an interpretation. We will clarify that quotation by changing "would be served" to "might be served."

^{16/} It is not unreasonable, however, for a carrier to provide that its offerings are available for resale only if the reseller has been certified as a common carrier by this Commission.

If a request for waiver is made, we will consider it as we would otherwise, although consideration of the policy set forth in the Report and Order will necessarily be a factor in our decision. Moreover, we are not extending our jurisdiction herein over any activity other than the communications and hybrid communications enunciated in the Computer Inquiry 17/ and Section 64.702 of our Rules. CBEMA quotes from our discussion of our jurisdiction over resellers and states (Petition at 12):

. . . the Commission could be read to conclude that all "resellers" of any product or service that includes use of communications in the provision of their product are common carriers. . .

In so articulating its test for communications common carriage, the Commission has stated one crucial element but failed to relate it specifically to the general resale market discussed at other points. That is, to be a communications common carrier, an entity must be holding out to the public a communications service, the means of transmitting messages from one point to another, in fulfillment of a communications purpose, rather than any other purpose such as data processing. [footnote omitted; emphasis in original]

Our language in the jurisdiction section as to resellers must be read in light of our definition of that term. In paragraph 17 of the Report and Order, we defined resale as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without "adding value") for profit. Inclusion of the phrase "communications services and facilities" after "reoffers" was done deliberately to emphasize that the "resale" with which we are concerned is only that of "communications." 18/ Thus, if what is ultimately offered to the public

17/ 28 F.C.C. 2d 267 (1971), aff'd in part and revs'd in part sub nom. GTE Service Corp. v. F.C.C., 474 F. 2d 724 (2d Cir. 1973).

18/ When we use "communications" herein, we also include those activities which currently are considered to be "hybrid communications" in Section 64.702.

is data processing or anything other than "communications", this proceeding is not applicable to such activity. The question as to what is "data processing" or "communications" is at issue in Docket No. 20828. This proceeding is not concerned with the definitions of those terms, and we assume herein that our jurisdiction attaches only to the activities which are found to be "communications."

20. Telenet raises the question whether the tariff restrictions on resale and sharing of a reseller's services are permissible under our policy. It points to language in paragraph 27 of the Report and Order which discusses in general the tariff restrictions of underlying carriers (i.e., those which own transmission facilities). That language, however, is simply in introduction to a discussion of AT&T's tariffs; in our conclusions throughout the Report and Order we have repeatedly referred to the unlawfulness of tariff restrictions for all private line services and facilities. "Resale carriers", whether they be brokers or "value added" carriers such as Telenet, are equally subject to the requirements of Title II of the Communications Act. We have concluded that such restrictions are unlawful under Sections 201(b) and 202(a), and this finding applies whether or not the carrier owns its transmission facilities. Resellers have a duty to serve just as do the carriers owning their facilities and that duty cannot be avoided by the creation of restrictions on the customer's ability to resell or share its services.

21. A number of parties have commented on our decision not to exercise common carrier regulation over sharing arrangements, or at least not to adopt specific regulations as to what sharing arrangements are allowable on an unregulated basis. To briefly summarize, in the Report and Order we defined sharing as a non-profit arrangement where several users collectively use, and allocate among themselves the cost of, communications services or facilities. We pointed out that sharing may be accomplished through a non-profit intermediary, ^{19/} by a simple sharing of line charges, or through an arrangement where one entity takes the lead role (perhaps, but not necessarily, as an intermediary) and allocates to the users a portion of all the costs of the sharing arrangement. We found that it was inconsistent with the concept of non-profit sharing for one participant in the sharing arrangement to allocate to the others a fee for management of the network, unless that participant is a non-profit corporation. (By participant, we refer to either a user or an intermediary.) We turn now to specific objections

^{19/} Although we did not define "intermediary" in the Report and Order, it was and is used to denote the entity directly responsible to the carrier for payment of the entire tariff charge associated with the service or facility. Generally, but not always, the intermediary will also be a user. We doubt that there will be many instances of bona fide sharing in which an intermediary (other than a non-profit corporation whose members are also the users) assumes responsibility to pay the carrier the entire tariff charge when it has no need itself for the communications service or facility.

to our position on sharing. First, it has been argued that "profit" is not a proper criterion for determination whether an activity is sharing or common carriage resale subject to Title II jurisdiction. See, e.g., United Petition at 2. In the Report and Order, we stated (para. 120) that our jurisdictional position is not based solely upon profit. ^{20/} We recognize that a basic jurisdictional criterion is whether there is an indiscriminate offering to the public, as that concept has been developed by the courts. See Nat. Ass'n. of Reg. Util Commr's v. F.C.C., 525 F. 2d 630 (D.C. Cir. 1976). The record herein establishes that sharing arrangements have the potential of large scale operations, both in geographical area and number of sharing participants. We do not otherwise place restrictions on the operation of sharing arrangements, but we feel that to allow the profit motive to be included in the operation would encourage, if not ensure, that sharing arrangements might offer indiscriminately their communications to the public. As we noted in para. 125 of the Report and Order, the sharing which we envision without regulation is that of users joining together in long term arrangements, each seeking to reduce communications costs which would otherwise be incurred. We disagree with the view that the activities of sharers and resellers are the same, absent profit (United Petition at 3), and our decision herein is thus consistent with that set forth in Land Mobile Radio Services, 46 F.C.C. 2d 752 (1974), affirmed sub nom, N.A.R.U.C., supra.

22. Telenet advocates the position that the abuses of unregulated sharing are made possible if anyone connected with the sharing arrangement operates as a profit making entity. It specifically finds inappropriate our decision which allows a for-profit network manager to provide its services to the sharing arrangement, so long as no sharing participant receives a payment connected therewith. We believe, however, that it would unduly restrict the creation of sharing arrangements to adopt Telenet's position. Moreover, it is questionable whether the mere provision of advice and management, especially by an entity with no obligation to the carrier, is sufficient to confer Commission regulation over the sharing arrangement. Telenet states that it is simplistic to assume that operation as a non-profit sharing entity precludes the realization of "profit in the economic sense." As noted above, the Commission has heretofore used that standard as a criterion upon which we can find that common carrier regulation is not appropriate. Extension of that concept to the policy set forth herein appears to be appropriate.

^{20/} We have heretofore used profit as a criterion upon which our jurisdiction is determined. See Industrial Radiolocation Service, 5 F.C.C. 2d 197 (1966); SIAC Response and cases cited therein.

23. A matter related to the "profit" issue is whether the management fee may be charged to a sharing arrangement by a network manager related to one of the sharing participants. Thus, Telenet argues (Petition at 18) that it could avoid common carrier status by obtaining communications lines in its name for use by others, and transfer to an affiliated corporation the network management (upon which a profit would be realized). We have held that a for-profit sharing participant may not charge a fee for network management, and this must be read as prohibiting such a charge by an entity affiliated with a sharing participant. Our policy may not be circumvented by the use of a separate but related corporation.

24. UPI states that the prohibition against charging a management fee is unfair to it. It points out that Associated Press, as a non-profit entity, may charge its members a management fee while UPI, which is a corporation organized for profit, may not. UPI believes that both should be able to charge a management fee and that it makes no practical sense to differentiate between them. We believe it best to prohibit the charge of a management fee by the for-profit intermediary, however, and state again that it is inconsistent with the concept of sharing as set forth in the Report and Order for one participant to charge the others for "managing" the network. We do not view the distinction between non-profit and for-profit corporation as "legalistic" or "simplistic", as does UPI. Rather, we see this as a definite standard which will minimize the opportunity for abuse of non-regulated sharing. In our view, this standard is preferable to the imposition of detailed Commission regulations, or the exercise of our judgment in each case with no guidelines at all. The record establishes the need for sharing arrangements which use an intermediary. The creation of non-profit entities to act as intermediaries will serve a valuable public function while minimizing the abuses which have heretofore been made possible. When the intermediary is a non-profit corporation, we will not interfere with the manner in which it manages its network. If UPI's subscribers find that it is not feasible to obtain network management from an outside entity, they may form their own non-profit corporation for the sharing arrangement.

25. AT&T, supported by the Network parties, states that the Commission should make clear that Series 7000 service should not be allowed for non-video use if it is resold or shared. AT&T states that the record is not complete as to the consequences of such non-video use, and that there are unique considerations, including the alleged "limited availability" of Series 7000 channels, which mandate that non-video usage not be allowed, at least without further proceedings. We are not willing to make such a requirement herein, although we are willing to consider the propriety of such a restriction if it appears from experience that sharing and resale of Series 7000 for non-video purposes is becoming extensive and is causing adverse effects as alleged. If there are special considerations which warrant different treatment of Series 7000, AT&T did not clearly state them in its Comments even though we requested such data in the Notice.

26. AT&T also states that the unintended result of this proceeding, without clarification, may be the creation of public message services similar to MTS and WATS. We noted in paragraph 64:

Unlimited resale and sharing of a private line service does not, of course, encompass the conversion of that private line into MTS or the equivalent thereof. Thus, any resale or sharing of FX service must maintain the basic private line character of that service.

AT&T points out that our definition of private line after that quotation is less comprehensive than that we recently set forth in the Execunet decision. See MCI Telecommunications Corp., 60 F.C.C. 2d 25 (1976), petition for review pending sub nom. MCI Telecommunications Corp. v. F.C.C., No. 75-1635 (D.C. Cir.). The difference in terminology was unintended. The question of what is private line service was not at issue herein. Where analog voice communication services are concerned, as was the case in Execunet, the distinctions between private line services and MTS or WATS which were cited in Execunet and related decisions clearly govern. ^{21/} Thus, with regard to AT&T's contention that the Report and Order provides the opportunity for creation of networks similar to MTS and WATS, we reaffirm our position that such arrangements will not be allowed.

^{21/} Telenet states that the Report and Order can be read to require resale and sharing of "private line offerings as distinguished from switched services." (Telenet Petition at 5, emphasis in original.) This is not our intent, and Telenet's reference to language in paragraph 55 is only to the use of "switched" as a characteristic of MTS and WATS. We have not defined private line services herein as only non-switched services, as Telenet implies, nor did we do so in Execunet.

Conclusions

27. For the reasons set forth above, we will not alter the policy which we prescribed in the Report and Order, except that we will not at this time apply that policy to international services. Also, a monopoly carrier providing a resale communications service need not do so through a separate corporation. We have found that there are important public benefits to be derived from elimination of the restrictions on resale and sharing of private line services and facilities, as set forth in paragraphs 75-88 of the Report and Order. Thus, we conclude that public interest is served by our adoption of a policy requiring unlimited resale and sharing of private line services and facilities, and the regulation of resellers (but not sharers) under Title II of the Act.

28. There are several procedural considerations to be dealt with. By Motion to the Chief, Common Carrier Bureau dated September 27, 1976, MCI requested additional time within which to file its response to the Petitions for Reconsideration. Although AT&T opposed the request as untimely filed, we will accept MCI's pleading. It appears that good reasons existed which made impossible the filing of its pleading on the date specified. Also, AT&T requests in its Petition that the Commission convene a meeting of interested parties to discuss and clarify the Report and Order. We do not see that this is required, and therefore deny the request. American Trucking Associations, Inc. filed a Motion to Strike the Reply of AT&T to its Opposition to Motion for Stay. This motion was filed the day before we acted on the Motions for Stay and did not come to our attention in time for our decision then. ATAI properly cites Section 1.45(d) of the Rules which states that a reply to an Opposition to Motion for Stay is not allowed. AT&T's reply will not be a part of the record herein. Finally, we recognize that additional time may be required for carriers to file revised tariffs consistent with the Report and Order and our decision herein. We therefore require that revised tariffs be filed not later than March 18, 1977. Such tariffs are to be effective 90 days from that filing date.

29. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration of our Report and Order in this proceeding ARE GRANTED to the extent discussed in paragraphs 10 and 11, supra, and ARE DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 77-159
44446

In the Matter of	)	
	)	DOCKET NO. 20097
REGULATORY POLICIES CONCERNING	)	
RESALE AND SHARED USE OF COMMON	)	
CARRIER SERVICES AND FACILITIES	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1977 ; Released: March 14, 1977

By the Commission:

1. We have before us for consideration a "Request for Stay Pending Judicial Review", filed by the American Telephone and Telegraph Co. (AT&T) in the captioned proceeding on February 14, 1977, and oppositions thereto filed by the American Trucking Associations, Inc. and MCI Telecommunications Corp. AT&T states that it will soon file a Petition for Review of our Report and Order in Docket No. 20097 (60 FCC 2d 261 (1976)), 1/ and that a stay of the effectiveness of the Report and Order should be issued pending a decision thereon by the United States Court of Appeals for the Second Circuit. 2/ In support of its request, AT&T cites various factors which, in its view, support a stay under the criteria set forth in Virginia Petroleum Jobbers Ass'n. v. F.P.C., 259 F. 2d 921 (D.C. Cir. 1958). We have previously relied upon this case in acting on requests for stay in Commission proceedings. See Communications Satellite Corp., 57 FCC 2d 571 (1976); Western Union Telegraph Co., 59 FCC 2d 1253 (1976). Briefly stated, the pertinent criteria for an administrative agency in determining whether a petition for stay should be granted are:

1/ In the Report and Order, we found unlawful the existing restrictions on resale and shared use of private line services and facilities. Carriers were ordered to file revised tariffs allowing unlimited resale and sharing. By subsequent orders, the tariff filing date was extended to March 18, 1977, and our policy was not made applicable to international private line services and facilities. See Resale and Shared Use of Common Carrier Services and Facilities, FCC 77-34, released January 12, 1977.

2/ ITT World Communications, Inc. and RCA Global Communications, Inc. have asked the court to dismiss their petitions for review. The petition of Western Union Telegraph Co. (No. 76-4237) is pending before the Court. AT&T states that it will adopt the current Scheduling Order of the Court, which calls for petitioners' briefs to be filed not later than March 25, 1977, with argument to be held during the week of May 9, 1977.

2.

- (a) Has the petitioner shown that without a stay it will be irreparably injured?
- (b) Would the issuance of a stay substantially harm other parties?
- (c) Would the public interest be adversely affected without a stay?

2. Before AT&T proceeds to the merits of its request, it urges that a stay pending judicial review is especially appropriate in this case because we have "explicitly acknowledged" that our action will "restructur^e/" and "drastically transform" the telecommunications industry. Request at 2, 4. We do not see our Order as a restructuring or drastic transformation of the telecommunications industry. However, that is not the issue. Our order will be important, we think, in providing more flexible and needed service to the public. We are removing an unlawful discrimination under which AT&T permitted sharing primarily by certain large users, and resale in restricted areas. We are requiring that the benefits of resale and sharing be made available on an equal, non-discriminatory basis. We have thus warranted that numerous public benefits will flow from unlimited resale and sharing of private line services and facilities (60 FCC 2d at 298-303); these benefits are discussed in paragraph 7, *infra*. But the advent of these important public benefits is surely no basis for a stay.

3. Furthermore, it is important to note that any impact which the effectuation of the Report and Order may have will not arise upon filing of the tariffs on March 18, 1977. We have ordered the carriers to make those revised tariffs effective on 90 days notice, so that, at the earliest, private line services and facilities will not be subject to unlimited resale and sharing before mid June, 1977. We also have the statutory authority to suspend the new tariffs for up to five months thereafter, if such action should be called for in light of any specific provisions of the tariff. In this situation it is doubtful that there will be any significant impact on, let alone "restructuring" of, the telecommunications industry prior to completion of court review. 3/

4. AT&T sets forth a number of areas as to which, in its view, the Commission's Report and Order will be reversed on appeal. We have dealt at length with the lawfulness of our decision herein, in both the Report and Order and on reconsideration. Further discussion of the matters heretofore considered would not be fruitful. The issues discussed at pp. 9-15 of the AT&T request must be resolved by the court. We remain convinced that our policy decision in this proceeding was both lawful and in the public interest.

3/ AT&T indicates (Request at 7, 25) that it anticipates a court decision in a relatively short period.

3.

5. AT&T states (Request at 15-17; attached affidavit of John F. Healy) that it will be irreparably injured if a stay is not granted. Although we recognize that AT&T will suffer some expense and inconvenience in preparing and filing new tariffs, such a consideration is not adequate to warrant the extraordinary relief of a stay. Moreover, we reject the allegation that a stay is required to prevent AT&T from losses in revenue as customers move from one tariff offering to a resold or shared service or facility. As we noted in West Michigan Telecasters, Inc., 33 FCC 2d 429 (1972):

Loss of money is not the irreparable injury for which relief by way of stay is available. Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F. 2d 920, D.C. Cir., 1958; Selma Television, Inc. (WSLA-TV), 31 FCC 2d 654, 22 RR 2d 962.

In any event, as we pointed out in paragraph 3, supra, the scheduling of the court proceeding and our prior requirement that the new tariffs be filed to be effective on 90 days notice (with an opportunity for five month suspension thereafter) minimize the likelihood of loss of revenue during judicial review. 4/ We also note that AT&T's allegations of annual revenue losses are largely conjectural and are not, as MCI points out, supported by satisfactory data.

6. AT&T argues that a stay will serve the public interest because the cost of implementing the order will be irretrievable, and because confusion and uncertainty will exist without a stay. However, AT&T has failed to demonstrate that during judicial review there will be costs to the public of the nature and degree suggested. We have previously referred (footnote 4, supra) to the fact that AT&T is now preparing to file new private line rates on June 8, 1977. Until these new rates are filed and become effective, the migration of customers, with attendant shifts in demand and reconfiguration of the network, is a matter of speculation. In fact, these customers will be aided in determining their requirements for private line service by having on file the new tariffs providing for resale and sharing. AT&T maintains that present effectuation of the Report and Order is impossible "in an orderly manner, consistent with the public interest and the desired goals of public certainty and service stability. . . ." Request at 24. We disagree. Although we did refer in our order extending the tariff filing date to the "varied interpretations" of the resale and sharing policy as set forth in the Report and Order, we believe that our subsequent order on reconsideration resolves any matters that might have been unclear.

4/ Also significant in this regard is the fact that AT&T is required to file revised private line tariffs by June 8, 1977, before the effective date of the new resale and sharing tariffs. See AT&T, 61 FCC 2d 587 (1976). Thus, it has an opportunity to prepare private line tariffs which allow it to earn a reasonable return on investment while providing for unlimited resale and sharing.

4.

7. The public interest requires that effectuation of the Report and Order not be delayed any longer. After examination of the extensive record in this proceeding, we concluded (60 FCC 2d at 998-303) that there were important public benefits associated with unlimited resale and sharing of private line services and facilities. Among these are (a) the provision of communications service at rates more closely related to costs; (b) better management of communications networks; (c) avoidance of waste of communications capacity; and (d) the creation of additional incentives for research and development of ancillary devices to be used with transmission lines. It is essential that the public now have on file the specific tariff revisions which will give rise to these benefits, even if the tariffs are not made effective immediately. Substantial interest in resale and sharing consistent with the Report and Order is evident. Resale and sharing arrangements can not be created with any great degree of certainty until revised tariffs are filed. Private line customers should also have the resale and sharing tariffs on file so that they are able to best determine how to satisfy their communications needs once the new tariffs for private line service are filed on June 8, 1977 (see footnote 4, supra). Moreover, a stay would delay even longer the right of intermediaries (such as American Trucking Associations, Inc.) to obtain service which has heretofore been available to other selected intermediaries such as Aeronautical Radio, Inc. and Securities Industry Automation Corporation.

8. AT&T's final argument is that even if a stay in toto is not appropriate, the Commission should stay the effect of the Report and Order as it requires resale and shared use of Telpak, pending any judicial review of the Commission's requirement that Telpak be terminated (AT&T, 61 FCC 2d 587 (1976)). Prior to our decision that Telpak must be terminated, we found no reason to exempt that offering from resale and sharing (60 FCC 2d 285-289). Telpak is now being resold and shared by certain selected customers. So long as Telpak remains a service, resale and sharing must apply for all.

9. Accordingly, for the foregoing reasons, AT&T's "Request for Stay Pending Judicial Review" is denied.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

